



# Guidelines on Judicial Assistance for People With Disabilities



# **Guidelines on Judicial Assistance for People With Disabilities**



**National Court Administration**

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Contents of these Guidelines can be verified and the various notices and application forms from the menu related to judicial assistance for people with disabilities can be downloaded in the judicial affairs system. Also, you can download the following from the website of the electronic civil service center for the courts of the Republic of Korea ([help.scourt.go.kr](http://help.scourt.go.kr)):

- Notice on Judicial Assistance (Provision of Convenience) for People With Disabilities;
- Application for Judicial Assistance (Provision of Convenience) for People With Disabilities;
- and Notice on Interpretation for People With Disabilities.

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Judicial authorities are required to provide people with disabilities with legitimate convenience so that they can, in a substantial way, access judicial proceedings and services in a manner equal to that enjoyed by people without disabilities. The courts have endeavored to guarantee the constitutional right to trial of people with disabilities, and realize in concrete ways the constitutional value of equality under the law by providing judicial assistance for people with disabilities.

It has been six years since the “Guidelines on Judicial Assistance for People With Disabilities” was published 2013. This effort gave members of the judiciary a practical guide to providing judicial assistance to people with disabilities. A new revised version was published to reflect the latest findings to guarantee the rights of socially disadvantaged people in judicial proceedings, address insufficiencies in the above Guidelines, and revise relevant laws and regulations.

Based on the steps of civil and criminal proceedings, this revised version provides an enhanced level of information and approaches to the following: the legal basis of judicial assistance for people with disabilities, the concept of disabilities and the different types of disabilities, the details of judicial assistance depending on the type and degree of the disability, and the procedures for applying for and providing judicial assistance. We hope that this Guideline will help not only members of the judicial branch but also all users of judicial proceedings.

Last but not least, we would like to express our sincere appreciation to the members of the 2nd Research Team for Judicial Assistance for People With Disabilities who have worked so hard for the publication of this Guideline, the editors who have shared their opinions and advice on this Guideline, and the staff of the Judicial Assistance Office of the National Court Administration. The National Court Administration will continue to endeavor to improve the policy and system to strengthen and institutionalize the ways in which judicial assistance is provided for people with disabilities in all areas of judicial proceedings.

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**Cho Jae-hyun**

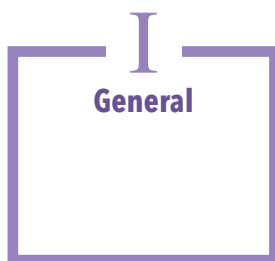
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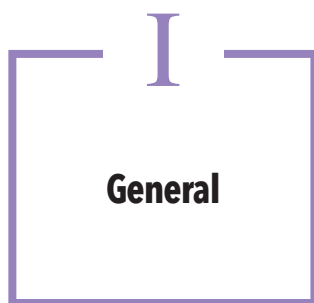
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## 1 Introduction

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In the past, the majority of people with disabilities lived separately from others, confined to their homes, special schools, or dedicated communities for people with disabilities. Such separation was largely due to a lack of convenience facilities, social prejudice, and insufficient national or social support. In addition, their access to legal proceedings was even more limited. However, the South Korean society is witnessing improved access to convenience facilities, elevated awareness regarding the rights of people with disabilities, integrated education, the advent of a self-reliant life for people with disabilities as a goal, and the advanced supplementary engineering technologies that helped people with disabilities to courts, and their social life.

People with disabilities are more vulnerable and are often faced with additional obstacles preventing them from asserting and defending their rights. People with communication issues or who are lacking in mental capacity often find it difficult to participate in judicial proceedings without help. For others, physical disabilities restrict their access to courts or movement within courts and other facilities.

Therefore, as a prerequisite for protecting the right to trial (Article 27 of the Constitution) of people with disabilities, judicial assistance should be provided in a way that ensures equal access to justice. Such assistance is significant in that it represents the realization of the constitutional right of equality under the law (Article 11 of the Constitution) with respect to people with disabilities.

The Convention on the Rights of Persons with Disabilities,<sup>1)</sup> enacted by the United Nations (UN) at its 61st General Assembly on December 13, 2006 by a unanimous vote, confirms in its Article 13 that each state has the obligation to ensure effective access to justice for people with disabilities on an equal basis as that enjoyed by people without disabilities. The convention was ratified in South Korea on December 11, 2008 and took effect on January 10, 2009. In addition, the Act on the Prohibition of Discrimination Against Persons With Disabilities, Remedy against Infringement of their Rights, etc. (hereinafter referred to as the “Act on the Prohibition of Discrimination Against Persons With Disabilities”), enacted on April 10, 2007 and enforced starting from April 11, 2008, prohibits discrimination against people with a wide range of disabilities, and stipulates the obligation to provide proper conveniences.<sup>2)</sup> This Act laid down the basis for various forms of judicial

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1) Article 13 Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
  2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.
- 2) The Act on the Prohibition of Discrimination Against Persons With Disabilities uses the terms “convenience” and “provision of convenience” to refer to various assistance provided to people with disabilities. While the majority of assistance to be provided by the Court to people with disabilities is based on the Act on the Prohibition of Discrimination Against Persons With Disabilities, there are other laws that form the crucial basis for judicial assistance, such as the Constitution, the Civil Procedure Act, and the Criminal Procedure Act. This guide uses the term “judicial assistance for people with

assistance provided by the court for people with different types of disabilities.

These laws and conventions, however, only provide comprehensive obligations for assistance and it does not detail the specific form of judicial assistance that must be offered for each types of proceedings and disabilities. Even the Civil Procedure Act and the Criminal Procedure Act are severely limited when it comes to providing such detailed prescriptions. Therefore, details of the judicial assistance to be offered for each types and stages of judicial proceedings and for different types of disabilities should be determined by interpretation. As the courts build up cases and practices regarding people with disabilities, there will be more detailed standards.

Accordingly, the guidelines on judicial assistance for people with disabilities, which compile the specific standards or contents of judicial assistance related to participation in judicial proceedings by people with disabilities, were first prepared and published in July 2013.<sup>3)</sup> Since then, each of the courts has enforced policies for specific assistance under the 1st Guidelines. The 1st Guidelines were revised to supplement the policies and institutions, and in particular, include the revisions of laws and regulations related to the judicial assistance policy and assistance for people with disabilities in electronic litigations.

This book essentially compiles in detail about the legal basis for judicial assistance for people with disabilities, the concept and types of disabilities, the details of the judicial assistance required for the different types and degrees of disabilities, and a summary of procedures for applying for and providing judicial assistance, followed by a more detailed exploration of the judicial assistance provided at different stages of civil and criminal proceedings which were included in the 1st Guidelines. Also, this book will

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disabilities” to include all of the bases provided by the laws listed above.

3) Hereinafter referred to as the “1st Guidelines.”



examine how the revised Guidelines will expand the judicial assistance for people with disabilities. The details of judicial assistance for civil litigation can be applied mutatis mutandis to family law litigations, administrative litigations, rehabilitation procedures, bankruptcy procedures, individual rehabilitation procedures, and other non-litigation cases.

### A. Constitution

The right of people with disabilities to receive the adequate judicial assistance in court proceedings falls under the constitutional protection of the fundamental right to trial (Article 27 of the Constitution). The right of people with disabilities to receive assistance from public defenders in criminal proceedings corresponds to the fundamental right of criminal suspects and defendants to prompt assistance of counsel (Article 12 of the Constitution).

In cases where a person with a disability participates in court proceedings as a member of the relevant national institution (a judge, a public prosecutor, or a court employee such as a court official), measures and assistance required for such person's conducting of his/her duties are provided based on the right to hold public office (Article 25 of the Constitution) rather than the right to trial. In cases where a person with a disability participates as a litigation representative or an attorney, such participation is closely related to the freedom of occupation (Article 15 of the Constitution). When a victim with a disability participates in court proceedings as a witness, it can be a realization of the victim's right to make statements (Article 27(5) of the Constitution).

Furthermore, the constitutional right to equality (Article 11(1) of the Constitution) serves as the fundamental basis for almost all judicial assistance processes for people with disabilities. As the constitutional principle of equality works in both ways by prohibiting the application of different treatment to the same, as much as it prohibits the application of uniform treatment to which is different, this principle may work in a more active way as the legal basis for

demanding different types of assistance for people with disabilities.

The part to be played by the Constitution may not be prominent in terms of providing immediate basis for judicial assistance to the following laws; the Civil Procedure Act, the Criminal Procedure Act, the Act on the Prohibition of Discrimination Against Persons With Disabilities, and the Act on Guarantee of Rights of and Support for Persons With Developmental Disabilities (hereinafter referred to as “Act on Persons With Developmental Disabilities”). Each laws have a more direct provisions that provides assistance. The Constitution, however, serves as an indispensable legal basis for interpreting individual laws, setting up the details of court procedures and evaluating them.

## **B. Civil Procedure Act and Criminal Procedure Act**

First, the main body of Article 143(1) of the Civil Procedure Act and Article 181 of the Criminal Procedure Act provide the legal basis for offering sign language interpretation<sup>4)</sup> to people with a hearing or speech impairment.

As for written communication, the exceptional sentence of Article 143 (1) of the Civil Procedure Act provides for asking questions or making statements in writing, and Article 73 of the Regulation on Criminal Procedure provides for questioning a witness with a hearing impairment in writing, and providing answers in writing in the case of a speech impairment. A proviso to Article 143(1) of the Civil Procedure Act is a significant provision that serves as the legal basis for written interpretation by a stenographer and others.

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4) Article 6 of the Established Rule on Interpretation & Translation and Processing of Cases Involving Foreigners (Jaeil 2004–5) stipulates that the Court of each instance should select two or more candidates as a sign language translator or interpreter for people with hearing impairment or speech impediment, in advance, by the end of every January, and prepare a list thereof. The Established Rule on Interpretation & Translation and Processing of Cases Involving Foreigners will hereinafter be referred to as the “Established Rule on Interpretation.”

Also, Article 55 of the Civil Procedure Act expands the litigation capacity of persons with limited capacity such as minors and adult wards, and Article 62 of the Civil Procedure Act expands the scope of application of the appointment of special representatives by persons with limited capacity by revising the existing special representative system. Article 143-2 of the Civil Procedure Act also stipulates that where a party has difficulty in making his or her statements due to his or her mental or physical limitations caused by a disease, disability, age or etc., he or she may be accompanied by his or her statement assistant when appearing before the court to give his or her statements if the court so permits.

The Criminal Procedure Act directs the court to appoint a public defender when the defendant is “deaf and dumb” or when the defendant has a mental or a physical disability (Article 33(1) 4 and 5). Also, the Criminal Procedure Act stipulates that where a legal representative, the spouse, a lineal relative, or a sibling of a criminal defendant or a criminal suspect is unable to act as an assistant due to disability or etc., a person with reliable relationship to a criminal defendant or a criminal suspect may act as his/her assistant (Article 29). The Criminal Procedure Act ‘requires’ the presence of a person with a reliable relationship (in case of the victim) or ‘allows’ the presence of such person (in case of a suspect or defendant). For a victim appearing as a witness (Article 163-2), a suspect being examined by a public prosecutor or a police officer (Article 244-5), or a defendant being examined at a trial (Article 276-2), if these victim, suspect, or defendant lacks the ability to discern right from wrong or to make and communicate a decision because of a physical or mental disability, then the law ‘requires’ the presence of a person with a reliable relationship. Article 55(2) of the Criminal Procedure Act, which stipulates that “where the criminal defendant is unable to read the protocol of trial, he/she may demand the protocol of trial to be read to him/her,” is also applicable to people with visual impairment or dyslexia. A proviso to

Article 157(3) of the same Act, which stipulates that “if the witness is not able to read or sign the written oath, a court official who participates in the trial shall act for him,” is also applicable to people who cannot speak because of a hearing impairment or speech impediment, or people who cannot write because of physical disability or brain lesion disability.

## **C. Act on the Prohibition of Discrimination Against Persons With Disabilities**

### **1) Overview**

The purpose of the Act on the Prohibition of Discrimination Against Persons With Disabilities is to prohibit discrimination, and to effectively safeguard the rights and interests of individuals with disability, thus enabling them to fully participate in society and establish their right to equality, which will ensure their human dignity and sense of value (Article 1).

Part 2 of the Act prohibits discrimination against persons with disabilities in six areas: employment (Section 1), education (Section 2), provision and use of goods and services (Section 3), judicial and administrative procedures, services and political rights (Section 4), motherhood, fatherhood, sexuality, etc. (Section 5), and family, home, welfare facilities, right to health, etc. (Section 6). The term “discrimination” refers not only to treating people with disabilities unfavorably by means of restriction, exclusion, segregation, or denial because of such disabilities without justifiable grounds, but also to the application of disability-blind standards that protects people with disabilities from unfairness even when there is no explicitly unfavorable treatment, such as restriction, exclusion, segregation or denial, and through refusal to provide convenience to the people with disabilities without justifiable grounds (Article

4 (1)).

## **2) Prohibition of Discrimination in the Provision of Judicial and Administrative Procedures and Services**

Article 26 of the Act on the Prohibition of Discrimination Against Persons With Disabilities specifies the prohibition of discrimination in the judicial and administrative procedures and services. In addition to the prohibition of discrimination against persons with disabilities in the provision of judicial and administrative procedures and services (Paragraph 1), the provision prescribes the obligation to provide judicial and administrative procedures and services to the extent that the disabled can use them on a substantially equal basis, and to provide legitimate convenience for that purpose (Paragraph 4), the obligation to comply with requests from people with disabilities for the provision of legitimate convenience, such as creating and providing forms that the individual with a disability can recognize and fill out on his/her own, for participating in judicial and administrative procedures and services (Paragraph 5), as well as the obligation of judicial institutions to check whether a person related to a case has a disability in communication or expression of opinion, and when such person with a disability requests assistance in criminal proceedings, to take the necessary measures for such assistance (Paragraph 6).

Article 17(1) of the Enforcement Decree of the Act on the Prohibition of Discrimination Against Persons With Disabilities, by delegation from Article 26(8) of the Act, stipulates the lists of conveniences that can be provided upon request from a person with a disability to support their judicial and administrative procedures and services, which include supplementary personnel, braille materials, text reader, sign language interpretation, reading by another person, voice assistance system, and computer. This list, however,

is not exhaustive; there will be many cases that may require services outside the list, depending on the type or degree of disability, the specific situation, or the needs involved.

### **3) Prohibition of Discrimination in Access to Information, Telecommunications and Communication**

No public institution (the state, local governments, and other institutions prescribed by Presidential Decree) should treat people with disabilities unfavorably on the grounds of such disabilities. Also, applying disability-blind standards that prevent people with disabilities from being treated fairly without justifiable grounds in their use and access of electronic and non-electronic information (Article 20(1)) is a duty. In addition, no public institution should compel, interfere with, or unfairly treat persons related to the people with disabilities who support their communication, such as by representing and accompanying the people with disabilities for the purpose of sign language interpretation, braille conversion,<sup>5)</sup> braille proofreading, reading, ghostwriting, direction, etc. without justifiable grounds (Paragraph 2 of the same Article).

In addition, necessary means—such as Korean sign language and writing—should be provided to ensure that people with disabilities may access information produced and distributed by public institutions with electronic devices or in other non-electronical methods (Article 21(1)). Moreover, public institutions should provide the support to enable the participation and communication of people with disabilities in any event hosted or supervised by themselves, with services like Korean sign language interpreters, text or vocal interpreters, and hearing aids (Paragraph 2 of the

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5) Translating words or letters into braille

same Article).

Article 14(2) of the Enforcement Decree of the same Act elaborates on the means to be provided pursuant to Article 21(1) of the Act on the Prohibition of Discrimination Against Persons With Disabilities as follows: “1. A website that ensures access to the desired services regardless of the user’s physical condition or technological aptitude; 2. Sign language interpreters, text or vocal interpreters, braille materials, braille information device, documents with enlarged fonts, magnifying glass, tape recorder, standard text file, personal hearing aid, closed caption, sign language interpretation, text reader, copying machine for people with disabilities, video telephone, telephone with relay function, or equivalent means.”

## **D. Other Laws and Regulations**

In addition to Articles 21(1) and 26 of the Act on the Prohibition of Discrimination Against Persons With Disabilities and Article 14(2)1 of the Enforcement Decree thereof, Article 32(1) of the Framework Act on National Informatization stipulates that “National agencies, etc., shall guarantee accessibility in providing information or services through the information and communication network so that people with disabilities, the elderly, etc., may easily use a website and application software installed on a mobile communication terminal (terminal necessary to use the facilities-based telecommunication service that utilizes a frequency allocated under the Radio Waves Act).” This obligation applies to cases in which a court provides case-related information on its website or constructs/manages various sites, including those offering electronic litigation services.

In addition, the Act on the Guarantee of Convenience Promotion of Persons With Disabilities, Senior Citizens, Pregnant Women and Nursing



Mothers prescribes the obligation to install convenience facilities to ensure convenience for persons with disabilities, senior citizens, pregnant women and nursing mothers in terms of their travel and facility use (Articles 3, 4, and 7). As a court building is subject to such obligation according to the Attached Table No. 1 of Article 3 of the Enforcement Decree of the Act, the installation criteria specified in Article 8(1) of the Act and the Attached Table No. 2 of Article 4 of the Enforcement Decree also apply to court buildings. Article 18(3) of the Act on the Prohibition of Discrimination Against Persons With Disabilities also makes it mandatory for an owner or manager of a building to provide legitimate convenience to people with disabilities in their access to and use of facilities or emergency evacuation. With regard to the details of legitimate convenience, Articles 11 and 12 of the Enforcement Decree of the Act on the Prohibition of Discrimination Against Persons With Disabilities apply regarding the specific criteria and details of such convenience and installation. The Act on the Guarantee of Convenience Promotion of Persons With Disabilities, Senior Citizens, Pregnant Women and Nursing Mothers, however, was designed for public facilities in general; it does not reflect the special circumstances unique to court buildings or courtrooms. For instance, the location of a courtroom in the building or the seat arrangement therein may cause difficulty for people using electronic wheelchairs and other people with disabilities attempting to access the gallery, counsel's table, or the witness stand. When such difficulty arises, the relevant court needs to apply active and flexible measures to ensure easy access for such people in line with Article 26 of the Act on the Prohibition of Discrimination Against Persons With Disabilities (Prohibition of Discrimination in Providing Judicial and Administrative Procedures and Services). For example, the court may proceed with the trial at a more easily accessible courtroom, or change the seat arrangement within the room.

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## 3 Concept and Types of Disability

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### A. General Concept of Disability and Types of Disability

When determining the specific judicial assistance to people with disabilities in need, there is a must precondition; that is to clarify what constitutes a “disability,” as the concept of disability requiring judicial assistance may vary depending on the interpretation of individual provisions.

Article 2(1) of the Act on the Prohibition of Discrimination Against Persons With Disabilities defines a disability as “a physical or mental impairment or loss of function that substantially limits an individual’s personal or social activities for an extended period of time.” This concept of disability is broader than that as a medical term, where the disability is based on the medical judgment of physical or mental impairment diagnosed by medical specialists that has primary focus on the treatment. On the other hand, the concept of disability in judicial services is close to one based on a social model, which perceives the disability not as a simple physical or mental impairment of an individual but as a restriction in interaction of social environments on daily bases. This concept of disability based on a social model emphasizes the responsibility of the society to improve the social environments so that people with disabilities can fully participate in all domains of daily or social life. Of course, the basic understanding of physical or mental impairment or loss in a medical sense is necessary to understand the disability in depth. Hereinafter, this in-depth analysis will be explained for each type of disability. There is a need for special attention to whether the activity and participation of people with disabilities in court proceedings are restricted by the disability, not based on the severity of the impairment or loss

of functions.

The Act on Welfare of Persons With Disabilities offers a more detailed definition of disability: Article 2 defines a person with a disability as a “person whose daily life or social activity is substantially hampered by physical or mental disability over a long period of time.” In addition, the provision defines a physical disability as “a disability of principal external bodily functions and of internal organs, etc.,” and a mental disability as “a disability caused by psychological development disorder or mental disease.” The Enforcement Decree of the Act elaborates on the types of disability and criteria for disability as defined by the aforementioned provision. The Attached Table No. 1 of Article 2 of the Enforcement Decree defines the following types of disability: physical disability, brain lesion disability, visual impairment, hearing impairment, speech impediment, intellectual disability, autistic disorder, mental disability, kidney failure, heart failure, respiratory organ failure, liver failure, facial disability, ostomy disability, and epilepsy disability. Article 2 (2) of the Enforcement Decree of the same Act specifies that rather than the numeric grades of disability, the degrees shall be determined by Ordinance of the Ministry of Health and Welfare in light of the fact that the disability grade system will be abolished on or after July 1, 2019. The Attached Table 1 Degree of Disabilities of People With Disabilities (related to Article 2) in the Enforcement Rules of the Act on Welfare of Persons With Disabilities, which is prescribed under the delegation stated above, divides people with disabilities into those with severe disabilities and those with non-severe disabilities, and abolished the detailed disability classification from grades 1 to 6.

## Disability Categorization under the Act on Welfare of Persons With Disabilities

1st category	2nd category	3rd category	Subcategory
Physical Disability	Disability of External Bodily Functions	Physical Disability	A person who has a disability such as amputation, joint failure, bodily function failure and deformation.
		Brain Lesion Disability	A person who is under substantial restrictions in walking or movement in his/her daily life because of a physical disability caused by an organic lesion of the brain, such as cerebral palsy, traumatic brain damage, and cerebral apoplex.
		Visual Impairment	A person who has impaired sight, or loss of field of vision
		Hearing Impairment	A person who has hearing impairment or balance impairment
		Speech Impediment	A person who has permanent and substantial impediment in vocal or speech function
		Facial Disability	A person who faces substantial restrictions in his/her social life due to deformation or malformation of the facial area
	Disability of Internal Organs	Kidney Failure	A person who faces substantial restrictions in his/her daily life because of continued hemodialysis or peritoneal dialysis or permanent disability of renal function caused by malfunction of kidney
		Heart Failure	A person who faces substantial restrictions in his/her daily life because of respiratory difficulty, etc. caused by chronic malfunction of the heart
		Liver Failure	A person who faces substantial restrictions in his/her daily life because of liver failure caused by chronic malfunction of the liver and complications therefrom, etc.
		Respiratory Organ Failure	A person who faces substantial restrictions in his/her daily life because of respiratory organ failure caused by chronic malfunction of the respiratory organs, such as lung and bronchial tube
		Ostomy Disability	A person who faces substantial restrictions in his/her daily life from undergoing an ostomy procedure due to disability of bowel movement or urination
		Epilepsy Disability	A person who needs the assistance of others and is under substantial restrictions in his/her daily life or social life because of a brain cell disability caused by epilepsy
	Mental Disability	Develop mental disorder	Intellectual Disability
Autistic Disability			A person who needs other's assistance and is under substantial restrictions in his/her daily life or social life because of the disability of language, body expression, self-control, social adaptive function and ability caused by infantile autism or atypical autism
Mental disability		A person who needs other's assistance and is under substantial restrictions in his/her daily life or social life because of the disability of emotional control, behavior, thinking and ability caused by continued bipolar affective disability (disability that shows an inappropriate emotional disorder in various reality conditions), schizophrenia, schizotypal affective disability, and recurrent depressive disorder	

Based on the explanation in the Act on Welfare of Persons With Disabilities, the Attached Table 1 of the Enforcement Decree thereof, and the Attached Table 1 of the Enforcement Rules thereof, disabilities may be classified as above table. Developmental disabilities have been added to the 2nd category which includes intellectual disability and autistic disorder. Even when the Attached Table 1 in the Enforcement Decree of the Act on Welfare of Persons With Disabilities does not define the concept of people with developmental disabilities as well as people with superordinate disabilities including people with intellectual disability and people with autistic disorders, Article 2 (2) 2 of the Act on Welfare of Persons With Disabilities classifies mental disabilities into a “disability caused by psychological developmental disorder” and “mental disease.” For reference, Subparagraph 1 of Article 2 of the Act on Persons With Developmental Disabilities also prescribes developmental disabilities as a superordinate concept of a mental disability and autistic disorder by describing people with mental disability and people with autistic disorder as one type of people with developmental disabilities.

These categories are defined to provide various welfare services under the Act on Welfare of Persons With Disabilities, such as disability allowance, support for self-reliant living, and auxiliary appliances through the disability registration system; the concept and scope of disabilities applicable for judicial assistance do not need to be restricted to those under the Act on Welfare of Persons With Disabilities.

Subparagraph 1 of Article 2 of the Act on Persons With Developmental Disabilities defines the concept of people with development disabilities separately in the following provisions: “If a person with a developmental disability becomes a party to a judicial proceeding, his or her guardian, a staff member of the central support center for persons with developmental disabilities, or a local support center for persons with developmental

disabilities prescribed in Article 33 (hereinafter referred to as “support center for persons with developmental disabilities”), or a person who has a reliable relationship with the person with a developmental disability may serve as an assistant thereto in trials of the court, with permission from the court” in Paragraph 2 of Article 12 (Guarantee of Rights in Criminal and Judicial Proceedings) of the Act on Persons With Developmental Disabilities; and, “Upon receipt of a motion from a person with a developmental disability him or herself, prosecutor, guardian, or the head of the relevant support center for persons with developmental disabilities when a court intends to examine the person with a developmental disability as a witness, it shall allow him or her to be accompanied by a person who has a reliable relationship therewith, except in unavoidable circumstances, such as where the judicial proceeding is likely to be substantially hindered” in Paragraph 3.

Subparagraph 1 of Article 2 of the Act on Persons With Developmental Disabilities prescribes a person with a developmental disability as “any of the following persons with disabilities as defined by Article 2(1) of the Act on Welfare of Persons With Disabilities” and then stipulates clauses (a), (b) and (c). The term “person with an intellectual disability” in clause (a) uses an expression identical to the one used to describe a person with disability (as to Article 2) “6. Person with an intellectual disability” according to the type and criteria for disability in the Attached Table 1 of the Enforcement Decree of the Act on Welfare of Persons With Disabilities. The term “person with autistic disorder” in clause (b) uses an expression identical to the one used to describe a “7. Person with autistic disorder” in the same Attached Table. Since same expressions are used, the concept of disability under the Enforcement Decree of the Act on Welfare of Persons With Disabilities can be consulted. However, Subparagraph 1 of Article 2 of the Act on Persons With Developmental Disabilities quotes only Paragraph 1 of the Act on

Welfare of Persons With Disabilities, which defines the term “people with disabilities” in Article 2 of the Act on Welfare of Persons With Disabilities, but does not quote Article 2 (2) of the Act on Welfare of Persons With Disabilities which delegates the prescription of the type and criteria of disabilities with the Presidential Decree.

Subparagraph 1 (c) of Article 2 of the Act on Persons With Developmental Disabilities prescribes the term as “other persons prescribed by Presidential Decree as those who have considerable impediments in their daily lives or social lives because of lack or significant retardation of ordinary development” and thus lays the basis for expanding the concept of a person with developmental disabilities beyond the category of a person with an intellectual disability under clause (a) or a person with autistic disorder under clause (b). However, the Presidential Decree under clause (c) has not yet been enacted. Thus, when construing the concept of developmental disabilities in relation to judicial assistance under the Act on Persons With Developmental Disabilities, it shall be examined whether the concepts of intellectual disability and autistic disorder under the Act on Persons With Developmental Disabilities shall be consulted, but its scope shall be expanded directly based on the Act on Persons With Developmental Disabilities in accordance with the intent of its provisions for judicial assistance.

## **B. Determination of Disability Requiring Judicial Assistance**

When determining a person’s disability for the judicial assistance, the cause of the disability is irrelevant. In other words, as long as needed assistance is provided to the acquired then whether the disability was

congenital or acquired does not matter. In particular, if a person whose hearing, vision, or mobility has become impaired because of old age, accident, or disease, that person will be treated as a person with a disability requiring judicial assistance regardless.

In most cases, a person with a disability requiring judicial assistance can be determined under the Act on Welfare of Persons With Disabilities. However, it should be noted that the concept of disability under the Act on Welfare of Persons With Disabilities may be different from the concept of disability requiring judicial assistance designed to ensure meaningful access to judicial services. Not all people with disabilities, as defined by the Act on Welfare of Persons With Disabilities, experience difficulties in accessing judicial services. In addition, others not covered by the Act on Welfare of Persons With Disabilities may need assistance for the access to judicial services. For example, a person suffering from a temporary hearing impairment because of a medical treatment for a disease or injury requires judicial assistance to use court procedures, even when such person is not defined as a person with a disability under the Act on Welfare of Persons With Disabilities because such person do not qualify the Act's "long-term" requirement. For disabilities not enumerated under the Act on Welfare of Persons With Disabilities, such as Tourette's Disorder, leukoplakia, complex regional pain syndrome, learning disability, dyslexia, it shall be determined whether the judicial assistance is actually required due to the disability.



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## **4 Judicial Assistance for Specific Types of Disability**

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### **A. Necessity of Judicial Assistance Specific to Different Types of Disability**

When we think of people with disabilities, we usually have a mental image of a person with a physical or brain lesion disability in a manual wheelchair. This association explains why we first think of physical facilities, such as roads without bumps, ramps, or elevators, when it comes to assistance for people with disabilities.

Although such facilities should be available for people with physical disabilities using wheelchairs, it should be noted that there are multiple types and degrees of disabilities that require different types of convenience facilities. The following sections discuss the characteristics of different types of disabilities, and the judicial assistance required by each.

### **B. Physical Disability and Brain Lesion Disability**

#### **1) Basic Understanding of Physical Disability and Brain Lesion Disability**

Physical disability refers to a motor disturbance (or sensory disturbance) caused by disease or injury affecting bones, muscles, or nerves. The following are typical physical disabilities: where a part of fingers, legs, toes, etc. is lost; where a function of the joints, such as the shoulder, elbow, wrist, finger, hip joint, knee joint, ankle joint, or toe joint, is disabled; or in cases of

physical dysfunction where the functioning of the finger, hand, arm, leg, neck bone, spine, talus, etc. is lost or substantially disabled. The following are also included among physical disabilities: legs are substantially different in terms of length; severe scoliosis; short stature disorder, etc.

Brain lesion disability refers to a physical dysfunction caused by a damaged central nervous system, which may be caused by brain damage because of cerebral palsy, a stroke, or a traumatic injury. Cerebral palsy refers to paralysis and other types of disability caused by brain damage and the resultant functional impairment that occurred during a person's brain development before birth, at the time of birth, or in his/her infancy. Paralysis generally does not progress further. Stroke refers to the clogging of blood vessels leading to the brain (cerebral infraction) or rupturing of those vessels (cerebral hemorrhage), which damages the brain tissue and causes various symptoms, including partial paralysis, speech impediment, and visual impairment.

For people with a physical disability who lose a part of their body or have a joint disorder, physical dysfunction, etc., the restriction of their intellect usually does not become an issue. Among people with brain lesion disability, people with cerebral palsy may be mistaken for people with an intellectual disability due to their physical appearance and manner of speech. However, people with cerebral palsy have an intellectual capability that is of the same level as others. With this being said, some people often have both cerebral palsy and intellectual disability. In some cases, the cerebral palsy coexists with visual and hearing impairment or other disabilities. Some people with brain lesion disability caused by a stroke or physical trauma are restricted only in their physical mobility, while the same brain damage accompanies a cognitive behavior disability, such as impairment of intellectual capability, logical reasoning ability, impairment of linguistic

ability, depressive mood, anxiety, social maladaptation and impulsiveness, and impairment of judgment. Therefore, the court needs to carefully discern whether the brain lesion disability of an individual only affects his/her physical capability or whether it also affects his/her cognitive behavior abilities, such as the intellect or ability to think, linguistic ability, and emotion. When people with a brain lesion disability exhibit physical disabilities only, their intellect shall not be suspected hastily after providing only the assistance that is provided for people with physical disability. On the other hand, even where a person with a brain lesion disability exhibits characteristics that may be evaluated as speech impairment, visual and hearing impairment, intellectual disability, or mental disability, it would be desirable to provide assistance in this area as well. The assistance can be provided in the following ways: Augmentative and Alternative Communication (hereinafter referred to as “AAC”) using auxiliary equipment; or, provision of a judicial assistant who can communicate with the person with a brain lesion disability. These ways will be examined in detail below.

## **2) Judicial Assistance for People With Physical Disabilities or Brain Lesion Disability**

The most prominent issue that affects people with physical disabilities or brain lesion disability is the ability to move, or means of transportation. A person with a physical disability or brain lesion disability will experience difficulty accessing the court building or the courtroom itself on a set trial date. Therefore, the court should determine what type of transportation a person with such disability uses, whether he/she is capable of walking on his/her own, whether he/she can use ramps or stairs, and whether he/she is capable of operating a manual/automatic wheelchair. People who are bedridden may need to use a bed-type wheelchair rather than an ordinary

wheelchair. Since a bed-type wheelchair generally has a larger steering radius, the following shall be checked in advance: whether a bed-type wheelchair could enter through a court door, and how court seats shall be arranged.

For people with a severe walking disability or people with disabilities requiring a wheelchair, it is required to provide a courtroom on the first floor which is accessible without stairs or a courtroom that is accessible by elevator. If the courtroom is accessible only by stairs, it must be changed to another courtroom that people with disabilities can access. In cases where people with a physical disability or brain lesion disability come to a court in their own car, it may be important for them to use a parking space reserved for people with disabilities. Thus, it is required not only to install such parking spaces but also to manage it so that people with disabilities shall not have difficulty using it. If it is difficult to use public parking spaces or parking spaces reserved for people with disabilities as they are full, courts may consider requesting cooperation from the public prosecutors' office or other public institutions nearby to open their parking lots. It may be difficult, during rush hours, for people with physical disabilities or a brain lesion disability to use public transportation, taxi for the disabled, etc. In this case it would be recommended to seek the opinion of people with physical disabilities or brain lesion disability when setting the court date and time.

Furthermore, as a person with severe physical disabilities or a brain lesion disability may require an assistant to move or use the bathroom, when a person with such disability is not accompanied by a personal assistant or an assistant provided under the Act on Activity Assistant Services for Persons With Disabilities, the court should determine whether to provide a temporary assistant.

In addition, people with severe physical disabilities or a brain lesion

disability often suffer from speech impediment because of brain damage or damage to their articulator or vocal organs, etc. Such communication issues can be addressed in the same manner as when communication assistance is provided for people with hearing impairment, speech impairment, intellectual disability or mental disability. Communication assistance for people with severe physical disabilities or a brain lesion disability is not limited to sign language translation or written interpretation; such assistance may take a variety of forms, including an assistant to provide communication support, an articulator device, a special keyboard, a special mouse, such as one controlled by eye or mouth movements, other input devices, or an AAC device. In cases where there is a speech impairment, intellectual disability or mental disability, the following are required: judges or court staff must accurately understand and be well-informed of the characteristics of communication caused by the relevant impairment or disability before proceeding with the hearings or judicial procedures; and a third party who helps with communication, such as a testimony assistant, testimony aide, and person with fiduciary relation, must be appropriately involved.

The following require assistance similar to that received by people with physical disabilities or brain lesion disability, but such assistance shall not be restricted to judicial assistance: people with heart failure, people with kidney failure, people with respiratory organ failure, people who use a wheelchair due to injury or disease. The question of whether it is necessary to provide additional judicial assistance appropriate for people with heart failure, kidney failure, respiratory organ failure or temporary injury or disease, etc. shall be well examined.

Moreover, assistants or auxiliary equipment for people with disabilities should be regarded as an extension of the body, and it shall be permitted for the assistants to appear in court and accompany the people with disabilities

and for the equipment to be had or worn in court. On that note, the Act on the Prohibition of Discrimination Against Persons With Disabilities includes articles regarding the interfering with the rightful use of guide dogs or auxiliary equipment for people with disabilities, or treating individuals representing or accompanying people with disabilities unfavorably by restriction, exclusion, segregation or denial, or refusing to provide legitimate convenience to such individuals. Such list of discriminatory acts is in (Article 4(1) 5 to 6).

### 3) Convenience Facilities

People with light physical disabilities are able to walk on their own, but they still require wider stairs or rails to hold on to while using stairs. In addition, ramps should be provided to enable people with disabilities using wheelchairs to get to the entrance. Most people with severe physical disabilities find revolving doors difficult to use, and these doors generally prevent the use of wheelchairs unless they are large enough to let wheelchairs through. Therefore, revolving doors should be installed in a way that will allow wheelchair access, or accompanied by a separate entrance.

It is necessary to design courtroom facilities to enable people who use manual or electric wheelchairs to be able to access a restroom, which is not a direct facility within a courtroom, but should be located close to the courtroom. This is because, if there is no restroom close to a courtroom which could be used before or after a trial or where a trial is prolonged, it is highly likely for the people who use manual or electric wheelchairs to give up or hesitate to attend the trial. If a restroom close to a courtroom unavoidably lacks convenience facilities for people with disabilities, another restroom equipped with such facilities within a court building shall be checked in advance. People with disabilities shall be informed of the

methods and procedures for using the restroom in advance.

However, even if the lack of convenience facilities is acknowledged, it takes a long time to install them. For this reason, it is necessary to check their status and the necessity for improvement every year or on a periodic basis, regardless of whether the participation of people with disabilities in judicial proceedings actually becomes an issue. As there are organizations that survey the convenience facilities and certify their accessibility for people with disabilities, it would be recommended for the court to request their service on a periodic basis (1 or 2 years).

Even if the guarantee of accessibility within a court for people with disabilities is not yet specifically enacted, convenience facilities are important to guarantee accessibility for people with disabilities not only to a court building but also within a courtroom. Even if it shall be enacted, the court at large or and each court shall endeavor to secure budgets for accessibility to courtrooms for people with disabilities and design, even gradually, to include the counsel's table, witness stand, and jury box for public participation trial in a courtroom to grant access for people using wheelchairs. The tables also should be of a height such that people using wheelchairs may use them without difficulty. A public gallery, etc. shall be provided in seats that could secure a clear view of the courtroom, and people with disabilities shall be able to easily find their position through the marking of a wheelchair seat, etc. However, it would be realistically desirable to create 1 or 2 for each court at first to provide accessibility for people with disabilities, and then expand such accessibility to all courtrooms on a gradual basis. It shall be noted that when establishing the standards for wheelchair accessibility, it is required to consider both electric wheelchairs and manual wheelchairs.

#### **4) Providing an Appropriate Amount of Time and Space for Rest**

People with severe physical or mental disabilities may find it physically challenging to sit in a wheelchair or to be seated for a long time. Some of them need to use the bathroom more frequently than able-bodied individuals. Therefore, the court should identify the state of a person with a disability by observing or asking the person directly, to ensure sufficient time and space for rest; for example, the court may consider adjourning the trial at a certain interval.

### **C. Visual Impairment**

#### **1) Basic Understanding of Visual Impairment**

Visual impairment refers to when a person's vision is impaired by a functional defect affecting his/her eyes. It can be described in terms of eyesight and field of vision. For example, Attached Table No. 1 of Article 2(1) of the Enforcement Rule of the Act on Welfare of Persons With Disabilities prescribes visual impairment with a focus on eyesight and field of vision. Visual impairment refers to when it is difficult to discern objects even with a means of vision correction, such as glasses and lenses, while a visual field defect refers to when one can only discern around an object viewed, as if viewed with a telescope.

The definition of visual impairment stated above may provide a reference for determining whether a person can be categorized as a person with a disability requiring judicial assistance. However, it cannot be relied on as an absolute criterion; rather, the court should identify the actual difficulties in terms of mobility or access to information, and alternative ways to access



information used by the specific person with visual impairment, in order to provide suitable assistance. People with visual impairment can be classified into two groups: people with total or almost total blindness who can only access information using braille, a screen reader, or audio recordings; and people with low vision who can access information using documents with enlarged fonts or magnifying glasses. The judicial assistance that the two groups require are different.

Most people with visual impairment identify their surrounding situation through sound. When having a conversation or going through certain procedures with people with visual impairment, especially when multiple people are involved, each speaker should identify himself or herself before speaking. In addition, the presiding judge or other parties to the conversation should describe situations not readily identifiable through sound. For example, when a party presents a certain motion during the proceeding, and the trial bench needs to discuss whether to grant the motion with the microphones off, the presiding judge needs to announce that “the bench will now go into discussion for a moment.”

## **2) Assistance of Mobility and Activity**

People with visual impairment require convenience facilities, such as braille blocks, braille directions, and voice guidance systems, for movement. Depending on the degree of impairment, some people with visual impairment are able to walk on their own using white canes, while others travel with the help of assistants or a guide dog.

Interfering with the rightful use of a white cane or the accompaniment of a guide dog constitutes a discriminatory action under the Act on the Prohibition of Discrimination Against Persons With Disabilities. A white cane is an auxiliary device that has become a symbol of the independence and self-

reliance of people with visual impairment, and October 15 of every year has been designated as White Cane Safety Day. Article 49(1)2(b) of the Road Traffic Act requires all drivers to stop when a person with visual impairment crosses a road carrying a white cane or accompanied by a guide dog. Article 40(3) of the Act on Welfare of Persons With Disabilities provides that when a person with a disability accompanied by a registered guide dog intends to use public places, etc., no one shall refuse him/her access without justifiable grounds. Article 90(3)3 of the same Act prescribes a penalty of up to KRW 3 million for violations thereof.

### 3) Access to Visual Information, Such as Characters

People with visual impairment require assistance with access to visual, written information as much as assistance with mobility and activities.

The judicial assistance provided should be diversified to account for various degrees of impairment and means of access used by specific people with visual impairment. We often think that people who are visually impaired will be able to read braille, but this is not true of all people with a visual impairment. As of 2017, only 12.4% of people with a visual impairment of grade 4 or higher (people with visual impairment with an eyesight of 0.08 or less on the better eye) were capable of reading braille, while 1.6% were in the middle of learning how to read braille. This leaves 86.0% who could not read braille,<sup>6)</sup> and shows the clear need for more diverse assistance. In particular, those who suffered visual impairment in the later stages of their lives are often incapable of using braille, or seriously restricted in their capability to use the same, thus requiring other ways to access information such as voice conversion. Because of the advancement of information and

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6) Kim Sung-hee and 12 others, 2017 Survey on People With Disabilities (Ministry of Health and Welfare, Korea Institute for Health and Social Affairs, 2011), p. 158

telecommunications technology, more people are relying on computers with braille terminals or screen readers, mobile devices with Text to Speech (TTS) app or audio guidance apps<sup>7)</sup> to access electronic document files.

In line with the above, each person with total blindness needs to be consulted regarding the specific means of access that he/she uses and provided with diverse ways to access such information based on the consultation, including braille, electronic files compatible with screen reader programs, and bar code printing for the use of optical character readers and audio materials.

#### **4) Braille, Optical Character Reader, Screen Reader, Audio Material**

While some braille materials are still created manually, most braille documents today are printed using electronic files and braille printers. When a regular document file is not available or suitable for braille printers, the file needs to be reedited for braille translation, and subsequent proofreading is required to eliminate typos and grammatical errors from the outcome. Braille translation of documents on mathematics, science, Chinese, French, foreign languages other than English, musical scores, and pictures requires a considerable amount of time. Experts who carry out such translation are called braille translators. Braille-translated documents will have more than three or four times the pages of the original document, and each page is far thicker than that of regular printed material. A braille terminal is an information communication device that converts document file input into braille or voices.

An optical character reader is a device that converts the contents of

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7) A program that extracts written information from the information shown on the computer monitor and provides the same in voice output

a document into voice for people who have a visual impairment or are illiterate. When a person with a disability puts the bar code printed on a page in front of the device, the device reads the contents of the relevant page. In this manner, the amount and thickness of pages required can be greatly reduced, as each small bar code image is capable of storing an amount of information equivalent to a full A4 page. However, one of the drawbacks of this method is that because the device reads the contents in its original sequence from start to finish, it is difficult to choose only the part needed, or to listen to the contents repeatedly.

A screen reader is a computer program that reads out loud various document files (txt, hwp, doc, etc.), the text on websites, menu texts displayed by an OS or program, etc. The program offers a speed control function and allows the user to access the specific part that he/she needs, or to listen to it multiple times. However, since this program extracts the text information and outputs it in the form of sound, it cannot convert an image file into sound. The so-called text PDF suitable to extract texts can be read, but text which is encrypted and thus cannot be copied or which is scanned and converted into an image cannot be read. Only text from a text PDF can be selected and copied by the screen reader. Thus, when an electronic file is provided, it must be provided as a file type that can be used by the screen reader.

Currently the electronic litigation record viewer provides documents prepared by courts as a text PDF that can be read by the screen reader. Even where the parties to a litigation and attorneys-at-law submit electronically the complaint, briefs, etc. in a format of document file, such as hwp, doc, etc., they are automatically converted into a text PDF and thus can be read with the screen reader. However, if a file is printed, scanned, and then submitted electronically, the file cannot be read by the screen reader. A user of the

electronic litigation must electronically submit written claim files not in an encrypted or scanned format but in the format of a document file from which the text information can be searched and extracted (Articles 8(4) and 12(1) of the Rules on the Use, etc. of Electronic Documents in Civil Litigations, etc.).

Audio materials can be provided through various methods according to the media used, such as in CD-ROM, magnetic tape, electronic file, and 2D bar code print for optical character readers.

## 5) People With Low Vision

People with low vision are able to access visual print using prints with enlarged fonts, computers with screen-magnifying programs, magnifying glasses, or magnifying readers. Among these, a magnifying reader enlarges the contents of the newspaper or the book on which it is placed, and displays them on a monitor screen or television screen. Portable and tabletop versions are also available. A magnifying reader also allows the user to further magnify the letters or control the color of the letters or the background. Visual presenters in courtrooms, when used appropriately, may be used to magnify documents or evidence and display them on the screen or the monitor.

Some people with low vision may require a screen reader, an optical character reader, or audio materials in the same manner as people with total blindness.

## 6) Importance of Securing Electronic Files

The kinds of assistance described above mostly involve electronic files of visual prints, except for a few approaches such as the manual creation of braille materials or optical magnification of the prints. This shows the significance of securing electronic files for documents related to the case when it comes to judicial assistance for people with visual impairment.

Article 17(1) of the Enforcement Decree of the Act on the Prohibition of Discrimination Against Persons With Disabilities grants the right of people with visual impairment to access visual information, and lists “braille materials, optical character readers, proxy reading, voice support systems, computers, etc.” as the legitimate conveniences to be provided to people with visual impairment when they demand such conveniences to use or participate in judicial and administrative procedures or services. In addition, Article 14(2)2 of the same Enforcement Decree lists “braille materials, braille terminals, documents with enlarged fonts, magnifying glasses, recording tapes, optical character readers, as well as standard text files,” as legitimate conveniences to be provided for communication.

Thus, if there are computer-generated electronic files for documents submitted during the trial, and the court is able to secure those files, the court needs to provide those files in the form of printed braille, documents with 2D bar codes, or files playable using screen readers. The court should exercise its right to lead the procedure to secure electronic versions of official documents issued from the court or other government bodies, such as the police and the public prosecutor’s office, as well as documents prepared by the other party or the attorney therefor. Thus, secured electronic documents should be provided in appropriate formats suitable for each specific situation, thereby assisting people with a visual impairment to access information related with the trial. The other party, or other related people, may refuse to provide electronic documents due the possibility of modification or manipulation, or indiscriminate distribution. The same risks exist when providing hard copies, however, and there are ways to hold those who modify, manipulate, or distribute them liable under civil and criminal laws. Therefore, it would not be reasonable to restrict the rights of people with visual impairment to access documents in relation to the trial and receive a fair trial on account of mere

risks that are not yet realized.

Article 48(2) of the Regulation on Civil Procedure stipulates that “a court, where it is deemed necessary, may request a person who submitted litigation documents to deliver the electronic files of such documents via electronic mail or other appropriate means to the court.” Article 8(4) of the Rules on the Use, etc. of Electronic Documents in Civil Litigations, etc. stipulates that “an electronic document (excluding documentary evidences) prepared by a registered user shall be submitted in a file format that allows the text information to be searched and extracted, unless there are unavoidable circumstances.” Thus, the presiding judge or court officials may order to correct and submit again in accordance therewith and may guarantee the right to access to people with visual impairment (Articles 135 and 140 of the Civil Procedure Act, Article 5 of the Regulation on Civil Procedure, etc.) Various replies, entrustments, written expert testimony, etc. shall be governed by Article 37(1) of the Regulation on Electronic Procedures that stipulate an obligation for electronic submission. On the other hand, the court’s final judgment Internet reading service (Article 163-2 of the Civil Procedure Act, Article 59-3 of the Criminal Procedure Act) has maintained a policy that provides the final judgment in the format of an encrypted PDF. However, its judicial assistance for the people with visual impairment is insufficient.

Even where courts fail to secure electronic files, courts shall produce and provide them, provided that people with a visual impairment request them. In accordance with Article 21(1) of the Act on the Prohibition of Discrimination Against Persons With Disabilities, public institutions shall provide the necessary means, such as a standard text file, to ensure that people with disabilities may access and use the electronic and non-electronic information they produce and distribute on an equal basis to persons without disabilities. Documents served by courts fall under the information distributed under the

above provision, and as such a request for an electronic file by a person with visual impairment shall not be refused. Optical Character Recognition (OCR) software extracts characters from an image file that scans written output, etc. and converts it into document files, such as TXT and DOC. OCR software is very useful when producing electronic files, as it can save the time and effort involved in converting documents. However, as an error could be generated during conversion depending on the status of original images, it is necessary to check the output. Even where an electronic file is not secured from the parties, etc., it is required to guarantee accessibility for people with visual impairment using OCR software.

## **D. Hearing Impairment and Speech Impediment**

### **1) Basic Understanding of Hearing Impairment and Speech Impediment**

Hearing impairment refers to loss of hearing, low speech discrimination or balance disability, while a speech impediment is a disability of vocal functions or speech functions. For example, the Attached Table No. 1 of Article 2(1) of the Enforcement Rule of the Act on Welfare of Persons With Disabilities classifies people with hearing impairment into “people who lost their hearing” and “people with a balance disability.” Of the two groups, people who lost their hearing ability or people with speech impairment particularly require assistance in relation to judicial proceedings, so this section will focus on this group. People with a balance disability may benefit from the assistance provided to people with physical disabilities or people with a brain lesion disability who have difficulty moving on their own.



People with a hearing impairment and people with a speech impairment are collectively referred to as the “hearing-impaired.” Also, the “deaf” are people with a hearing impairment who use the Korean sign language as an everyday language in the deaf culture of the Republic of Korea (Subparagraph 3 of Article 3 of the Korean Sign Language Act).

People with a visual or speech impairment are restricted only in their communication capability, and have a decision-making competence that is basically identical to that of people without disabilities. However, where people with hearing impairment have not acquired proper communication means in their growth process, they may be less educated due to this restriction on their receipt of knowledge and information. Given that the difference in intellectual level among people with hearing impairment may be larger than that among people without disabilities, communication means that are appropriate to the degree of communication competence and intellectual level of each person with hearing impairment shall be provided. In addition, both in sign language and in oral conversation, people with a hearing impairment may sometimes pretend to understand, even when they do not. Thus, it must be accurately confirmed whether people with a hearing impairment understand, and attention shall be paid and effort such as the provision of additional communication means, etc. shall be made.

Even where a person with a hearing impairment loses their hearing completely and thus communicates with sign language interpretation, written interpretation, etc., the other party shall catch their attention by waving hands or turning on the light of microphone before speaking. The other party shall speak slowly with correct pronunciation, and ensure his/her mouth is well visible. This is because people with hearing impairment receive information visually through the mouth shapes, facial expressions, gestures, etc. of a speaker.

Speech impairment refers to when the communication is poor due to an anomaly in the process of expressing a thought with voice. Thus, even if people with speech impairment have difficulty in speaking, it is desirable to wait sufficiently until they finish speaking rather than to look immediately for an alternative communication means, such as handwriting on paper.

Also, people with a hearing or speech impairment may, in a communication process, use somewhat large expressions, gestures, etc. compared to people without disabilities. Such facial expression, gesture, etc. shall not be restrained out of concern of being misunderstood as a strong expression of emotion. Rather, an effort shall be made to accurately understand, by observing in detail, what people with a hearing impairment or speech impairment try to express.

## 2) Diversity of Communication Methods

I The most serious issue faced by people with a hearing or speech impairment is exclusion from audio communication. In terms of the communication methods of people with a hearing or speech impairment, as of 2017, people with a hearing impairment relied on spoken word (88.0%), followed by sign language (3.8%), oral conversation (3.4%), conversation using handwriting on paper (2.3%), and gestures (2.2%). People with a speech impairment relied on spoken word (44.2%), followed by gestures (34.3%), sign language (8.4%), handwriting on paper (5.4%), and oral conversation (3.0%).<sup>8)</sup> On the other hand, people with a hearing or speech impairment who are almost or completely incapable of talking with words used communication methods such as sign language (45.4%),

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8) Kim Sung-hee and 12 others, 2017 Survey on People With Disabilities (Ministry of Health and Welfare, Korea Institute for Health and Social Affairs, 2011), pp. 165-73

handwriting on paper (32%), and oral conversation (22.6%).<sup>9)</sup> The following shall be considered: people with hearing or speech impairment have diverse communication means, and even if people with a hearing or speech impairment use sign language, oral conversation, etc. as their main communication means, it is not easy to convey the meaning of legal terms, etc. Thus, simply providing sign language interpretation, written interpretation, etc. for people with a hearing or speech impairment shall not be sufficient to determine that the procedures are satisfied. Rather, the use of diverse communication means concurrently to convey the meaning more accurately shall be actively reviewed.

### 3) Sign Language

Sign language is the inherent language of the deaf, and Korean sign language is the official language of the deaf of the Republic of Korea, with a status equivalent to the Korean national language. The deaf and users of Korean sign language shall not be discriminated against for using Korean sign language, and shall have the right to live a life and be provided with the necessary information required to use Korean sign language in all areas of life (Articles 1 and 2 of the Korean Sign Language Act). It is advisable to provide the deaf with sign language interpretation as the preferential communication means.

However, even if the deaf are able to use sign language, it is not easy to accurately interpret the meaning of legal terms into Korean sign language. The accuracy of interpretation may vary depending on the level of proficiency with sign language, or the interpreter's level of interpretation skill. For

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9) 2017 Survey on Employment Panel of People With Disabilities (2<sup>nd</sup> wave 2<sup>nd</sup> survey), Employment Development Institute of the Korea Employment Agency for Persons With Disabilities (May 2018), p. 82; national estimate calculated based on the sample survey

example, the fact that one can use sign language for everyday conversation does not necessarily mean that one can communicate complicated facts of crime or statements with regard to legal issues through sign language. For this reason, it would be advisable to use written interpretation, etc. in parallel and to also present visual data such as figures and tables in order to improve the accuracy of interpretation.

The current Korean sign language is a mix of the following: natural sign language that has been naturally established among the deaf; and grammatical or sentence-based sign language that has been made artificially based on the order of phrases, postpositions, predicate elements, and tenses of Korean grammar.

Most deaf people use natural sign language, and in many cases, even natural language interpreters may not be proficient in the natural sign language. On the other hand, people who are not qualified as sign language interpreters may be proficient in the natural sign language. Therefore, a sign language interpreter should be designated based not only on his/her sign language interpreter qualification but also on his/her ability to actually communicate with the deaf. In some cases, even a person who is not qualified as a sign language interpreter may be designated as a sign language interpreter.<sup>10)</sup>

A sign language interpreter who has hearing impairment is called a “sign language interpreter with hearing impairment.” A sign language interpreter with hearing impairment interprets between the deaf, or between the deaf and a sign language interpreter). A sign language interpreter may be limited in understanding the unique expressions of the deaf. However, a sign language interpreter with hearing impairment could understand and deliver the unique

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10) Meanwhile, the “Examination for Korean Sign Language Teaching Ability” and the “Korean Sign Language Proficiency Test” will be conducted from 2019 and 2020, respectively. Thus, sign language interpreters could be designated based on the results thereof.

expressions of the deaf more accurately. Also, the deaf could have greater trust in the whole interpretation process through the intervention of a sign language interpreter with hearing impairment. Specifically, a sign language interpreter with hearing impairment primarily interprets an expression of opinion by the deaf with a refined sign language and then a sign language interpreter secondarily interprets the sign language interpretation into voice, or vice versa. If a sign language interpreter with hearing impairment intervenes with interpretation, the communication can be more accurate. Thus, where a deaf person requests to additionally designate a sign language interpreter with hearing impairment, it is desirable to positively examine whether to additionally designate a sign language interpreter with hearing impairment. Where a deaf person is not proficient in sign language or it is questionable whether a sign language interpreter is interpreting accurately, it is advisable to additionally designate an ex officio sign language interpreter with hearing impairment, even without the motion stated above.

In addition, people with hearing impairment who grew up isolated and without any exchanges with the outside world and no chance of education may not be familiar not only with the Korean sign language but also with any language at all. In addition, if such person with hearing impairment is not capable of understanding written words, the court may need to rely on the most basic communication methods such as hand or body gestures or facial expressions, which are the so-called “Home-Sign.” Moreover, in cases where only a family member or close relative is able to understand the signs or gestures used by a person with hearing impairment, the court may appoint such family member or relative as an additional interpreter, or invite him/her to assist with the interpretation. In addition, where the court has sign language interpretation provided, attention shall be paid to what is specified in the Annex. The Relay Call Center provides remote sign language interpretation

services through the internet ([www.relaycall.or.kr](http://www.relaycall.or.kr)) or mobile phone (107 without area code). For interpretation outside the courtroom, such as in the receipt stage, these services may be an option.

#### 4) Oral Conversation

Some people with hearing impairment learn to recognize the words spoken by others through lip reading, and can express themselves by learning how to form spoken words. The means of communication used by these people is called “oral conversation,” which is distinct from sign language.

When having a conversation with a person with hearing impairment using oral conversation, the speaker should attract the eyes of the person with hearing impairment by waving hands or turning on the light of their microphone before starting to speak, and then pronounce clearly while correctly shaping his/her lips, approach as closely as possible, pay attention not to speak while the person with a hearing impairment is not looking, and provide written interpretation simultaneously as needed.

The fact that a person can use oral conversation for everyday communication does not necessarily mean that he/she can use oral conversation for all statements and exchanges within the courtroom. It is a common misconception that a person with hearing impairment using oral conversation is as capable of hearing others as he/she is capable of speaking. The ability to understand spoken words through lip reading, however, will vary widely depending on the speed, proximity to the other person, surrounding noise (the level of remaining hearing of a person with hearing impairment using lip reading differs greatly among people with hearing impairment), subject matter (everyday matters or professional matters), and other situations. It is highly likely that legal terminology used in court proceedings will not be properly communicated through lip reading. Oral

conversation, in most cases, is not a sufficient means of communication, unless such conversation takes place in an ideal environment, involves no more than two people, and concerns subjects that are well-known to both parties. In addition, lip reading requires a substantial degree of attention. Thus, where oral conversation takes place, a proper recess shall be provided so that people with hearing impairment can communicate without losing their attention.

## **5) Written Interpretation, Handwriting on Paper, Augmentative and Alternative Communication (AAC)**

For a person with hearing impairment who has difficulty communicating legal terms or complicated facts of the case through sign language interpretation, or is not proficient in sign language or oral conversation, written interpretation based on stenography may be a useful option. Article 143(1) of the Civil Procedure Act and Article 73 of the Regulation on Criminal Procedure provide for questioning and statement through writing or documents.

Each court employs a number of stenographers, and the results of stenography can be shared on the screen installed in the courtroom; therefore, each courtroom is more than prepared to utilize stenography to aid communication through written interpretation.

In cases where a person with a hearing or speech impairment participating in legal proceedings is not capable of expressing himself/herself using sign language or oral conversation, a keyboard or other means may be required. In addition, in cases where the use of a computer is limited, such as during on-site verification, or when the relevant person is not familiar with a keyboard, communication can be achieved by handwriting on paper, or by using mobile phones or notebooks to type words. In addition, where the court

has stipulated that written interpretation be provided, attention shall be paid to what is specified in the Annex.

Also, for people with a speech impairment, the AAC could be employed, in which communication is achieved by pointing tools using fingers or the pupil of the eye to point at figures or symbols. Use of the AAC device that people with speech impairment carry, smartphone applications, etc. could be considered.

Written interpretation presupposes the ability to understand and use Korean sentences. Some people with hearing impairment may be illiterate or lack the ability to understand and use sentences due to their lack of education in the Korean language. Therefore, the relevant person with hearing impairment should be assessed and verified for his/her ability to understand and use Korean sentences before using written interpretation or handwriting on paper for communication. Since the accuracy of written interpretation or handwriting on paper may be limited, it should be used as a means of communication in a manner that is complementary with sign language interpretation or oral conversation, in parallel with various means of communication depending on the characteristics of individual people with hearing impairment.

## **E. Developmental Disability**

### **1) Basic Understanding of Developmental Disability**

Developmental disability collectively refers to conditions that exhibit, in a developmental stage, an anomaly in the central nervous system or a delay in the development of cognition, language, sociality and mobility due to various reasons. The Act on Welfare of Persons With Disabilities classifies



the developmental disability into intellectual disability and autistic disorder.<sup>11)</sup> Intellectual disability generally means insufficient or incomplete intellectual development or low level of social behavior. People with an intellectual disability have scored below a certain threshold in a standardized intellect test or social maturity test that comprehensively considers a person's cognition, speech, mobility, and social development. The Attached Table No. 1 of Article 2(1) of the Enforcement Rule of the Act on Welfare of Persons With Disabilities defines people with an intellectual disability as people with severe disabilities "whose IQ is 70 or less and who can be rehabilitated socially and occupationally through education." Autistic disorder does not allow for a clear definition, as the term is used in so many ways. However, it generally refers to a state where a person shows limited and repetitive attentions and activities, and is substantially restricted in daily or social life and thus requires other's help. The Attached Table No. 1 of Article 2(1) of the Enforcement Rule of the Act on Welfare of Persons With Disabilities defines people with autistic disorder as people with severe disabilities who fall under a pervasive developmental disorder (autism)<sup>12)</sup> under the diagnosis criteria of the 10th International Statistical Classification of Diseases and Related Health Problems, exhibit no normal development stage, and need help intermittently in their daily or social lives due to their disability."

The classification and definition of a developmental disability stated

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11) In the past, the Enforcement Decree of the Act on Welfare of Persons With Disabilities designated "intellectual disability" and "autistic disorder" as "mental retardation" and "developmental disability," respectively. However, the 2007 Enforcement Decree of the Act on Welfare of Persons With Disabilities was revised completely and the terms "mental retardation" and "developmental disability" were changed to "intellectual disability" and "autistic development," respectively, in order to dispel the social misunderstanding created by those terms and establish accurate criteria.

12) Among the pervasive developmental disorders, the following are referred to as "autistic spectrum disability": autistic disorder (autism), Asperger's syndrome, and overall developmental disorder not specifically classified. [E. Amanda Boutot & Brenda Smith Myles (translated by Seo Gyeong-hee, Lee Hyo-shin and Kim Geon-hee), *Autistic Spectrum Disability*, Sigma Press (2012), p. 7].

above are governed by the Act on Welfare of Persons With Disabilities. However, it shall be noted that the disability experienced by people with disabilities may differ from their disability that is registered under the Act on Welfare of Persons With Disabilities. There are cases in which an intellectual disability is registered but it is accompanied by autistic disorder, and vice versa. Also, it shall be also considered that a disability may require assistance in judicial proceedings, even if the disability is not included in the category of intellectual or autistic disability under the Act on Welfare of Persons With Disabilities. For example, people with Tourette's Syndrome who repeatedly exhibit tic disorder may have difficulty in testifying, while a person with the learning disability of a reading disorder may not be able to read the oath.<sup>13)</sup>

## 2) Judicial Assistance Required

Issues related with court proceedings involving a person with developmental disability include: ① the person's understanding of the proceedings themselves, and of the statements from other people involved; ② whether the person's statement is based on his/her genuine intention; and ③ credibility of statements provided by the person.

① When a person with a developmental disability participates in court proceedings, the bench should explain and conduct each procedure

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13) Persons eligible for special education under the Act on Special Education for Persons With Disabilities include those who have any of the following disabilities: intellectual disability; autistic disorder; emotional disturbance or behavioral disorder; learning disability; or developmental delay (Article 2 Subparagraph 3 and Article 15). The disability classification under this Act is not the same as that under the Act on Welfare of Persons With Disabilities.

On the other hand, the Act on Persons With Developmental Disabilities classifies persons with development disabilities into (1) Persons with an intellectual disability, (2) Persons with autistic disorder, and (3) Other persons prescribed by Presidential Decree as those who have considerable impediments in their daily lives or social lives because of a lack or significant retardation of ordinary development. The definitions of (1) Persons with intellectual disability and (2) Persons with autistic disorder are identical to the definitions under the Act on Welfare of Persons With Disabilities. However, there is no provision for (3) Other persons with developmental disability in the Enforcement Decree.

using plain language as much as possible so that the person with the developmental disability themselves can understand the court proceedings and the testimony of those participating therein. In some cases, however, a person with a developmental disability may be treated as a child because his/her intelligence is imperfect, which is inappropriate. Even if plain language is used, the bench must respect the person with a developmental disability appropriately according to his/her physical age. Also, the bench shall not exclude the person with a developmental disability and try to communicate with persons related to the people with disabilities, such as parents, assistant, etc. The bench shall talk directly to the person with a developmental disability who is a party to the court proceedings, and shall obtain assistance from the persons related to the people with disabilities, if such assistance is required for communication.

② The bench shall review carefully whether a statement given by a person with a developmental disability is based on his/her genuine intention. It shall be considered that the person may not express his/her opinion properly due to his/her circumstances or the influence of someone close to him/her, such as family members, or assistant.

When examining a person with a developmental disability, it would be desirable to sufficiently form a trust relationship before examination. However, if this is difficult, persons related to the people with disabilities, a person in a reliable relationship, etc. shall be utilized actively so that the person with a developmental disability could testify in as psychologically stable a state as possible. On the other hand, family members, assistants, etc. who sit together with those related to the person with a disability may have an interest in the case. Thus, it shall be examined whether family members, assistant, etc. are appropriate as persons related to the person with disabilities or a person in a reliable relationship.

③ To guarantee the credibility of statements provided by a person with a developmental disability, open-ended questions<sup>14)</sup> shall be used in witness examination, and focused or suggestive questions shall be avoided. If required, auxiliary equipment such as anatomical dolls and pictures shall be used.<sup>15)</sup> In certain cases, expert assistance may be required in relation to statements given by a person with a developmental disability.

On the other hand, for individuals with a developmental disability (mainly autistic disorder), the “expression of opinion in a different way”<sup>16)</sup> may be an issue. The “expression of opinion in a different way” is an act that is harmful mainly to the actor himself/herself or others and may appear in various forms, such as assault on others, self-injurious behavior, safety ignorant behavior (running into a busy road, etc.), damage to facilities, etc. These acts have their causes and purposes. It is necessary to understand that it is difficult for a person with a developmental disability to maintain a stable state emotionally and physiologically, and to find out what makes such person anxious or sensitive. Also, since a person with a developmental disability can control himself/herself through his/her own methods, it is required for him/her to use the method in a courtroom. For example, a person with a developmental disability may control himself/herself by spinning around in the same place, jumping or shaking his/her body. Or the

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14) Examples of open-ended questions include: “Please tell us everything about that,” “Please tell us more,” “And?”, “So?”, “And next?”, “Please tell us what happened between - and -.”

15) Regarding the reliability of statements made by children, some studies argue that the use of auxiliary equipment may have a negative effect on their statement. Accordingly, some believe that it would be desirable to use the auxiliary equipment only to check the answer of a person with a developmental disability in the latter part of a witness examination. However, more studies shall be conducted in future as to whether a study on the reliability of statements made by children could be applied to people with a developmental disability without change.

16) This is described as “antisocial behavior,” “challenging behavior,” “problematic behavior,” etc. These expressions themselves contain a negative social assessment. The term “expression of opinion in a different way” was used herein in light of the fact that it is only a difference in how an opinion is expressed from the perspective of the person with a developmental disability.

person may settle down by chewing something. Thus, where a litigant has a developmental disability, it is required to determine his/her characteristics in advance and create an environment in accordance therewith.

## F. Mental Disability

### 1) Basic Understanding of Mental Disability

According to the Enforcement Decree of the Act on Welfare of Persons With Disabilities, mental disabilities involve having difficulty with daily or social life and requiring other's help because of disability of emotional control, behavior, thinking, function and capability caused by persistent bipolar affective disability, schizophrenia, schizotypal affective disability, recurrent depression, etc.<sup>17)</sup> among the mental disabilities enumerated in the Act on Welfare of Persons With Disabilities. Only where a mental disease enumerated above is diagnosed shall a degree of disability be determined, in consideration of the state of the mental disease and the state of the mental disability (what is determined as to how much daily or social life is disrupted by the mental disease and how much help from others is

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17) According to Kim Sung-hee et al., 2017 Survey on People With Disabilities, Ministry of Health and Welfare, Korea Institute for Health and Social Affairs, 2011 (p. 113), the diseases that constitute mental disability can be described as follows.

- Bipolar affective disorder: manifests as repeated fluctuation of emotion or mood; alternates between manic episodes with abnormal elevation of mood, paranoia, leaps in thought, sleeping disorder (almost no sleep), and depressive episodes with abnormal frustration, guilt, suicide, sleeping disorder (too much sleep or no sleep), loss of appetite, and isolation from interpersonal relationships.
- Schizophrenia: accompanies perceptible disorder (hallucination, etc.), thinking disorder (paranoia, thought broadcasting), affective disorder (insensitivity), dysboulia (indifference), etc., as a mental disease that breaks out mostly from around adolescence to the early 20s.
- Schizotypal affective disorder: refers to cases in which schizophrenia and affective disorder (manic/depression episodes) simultaneously manifest at the same level.
- Recurrent depression: abnormal frustration, along with guilt, suicide, sleeping disorder, loss of appetite, or avoidance of interpersonal relationship.

received).

The definition of disability and the determination of the degree of disability shown above are in accordance with the Act on Welfare of Persons With Disabilities and the Standards for Determining the Degree of Disability (Notification of the Ministry of Health and Welfare), and are subject to a medical diagnosis. However, it is known that only 15-20% of mentally ill persons are registered as people with disabilities. It seems that they are afraid that they may be subject to social prejudice and disadvantage, if the fact that they have mental disabilities was known. Thus, judicial assistance for people with mental disability shall not be determined based only on the registration thereof. It shall be taken into consideration that even if a mental disease is not included in the list of mental disabilities under the Act on Welfare of Persons With Disabilities, a person with a mental disability may need judicial assistance. For example, panic disorder is not included among the mental disabilities under the Act on Welfare of Persons With Disabilities. However, since a person with panic disorder can show a panic attack unexpectedly, the person may need proper assistance in the judicial proceedings.<sup>18)</sup>

## 2) Judicial Assistance Required

While people with a mental disability usually require no special assistance in terms of mobility and access, this may not always be the case. For example, a person with a mental disability who is afraid to walk out the door or contact people outside due to paranoia or hallucination may need to receive assistance from people in a reliable relationship (co-counselor, social

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18) For reference, the Act on the Improvement of Mental Health and the Support for Welfare Services for Mental Patients defines a mentally ill person as a “person who suffers serious restraints in conducting daily activities independently due to delusion, hallucination, a disorder in thought or mood, or any other cause.”

worker, government employee, acquaintance, etc.).

Also, people with mental disability may need assistance for communication. To freely express one's opinion, it is required to understand the other's explanation or circumstances. However, a person with a mental disorder would have difficulty in understanding the same for themselves. People with mental disorder may need assistance, as their cognitive function is deteriorated or their language function is impaired due to the long-term medication for their mental disease. Some people with a mental disability may feel confused when they are explained things in a long and complicated way. In such cases, it would be better to use terms that are as easy as possible and speak in a short, quiet, direct and simple manner. If required, a person with a mental disorder could testify in a mentally stable state as much as possible by having them accompanied by a person with whom they have reliable relationship, etc. Where the mental disability is related to the credibility of testimony, it may be useful to be assisted by experts.

However, the court needs to prepare itself against possible episodes by ensuring that it understands symptoms that characterize such disability—seizure, paranoia, hallucination, thinking disability, odd behavior, personality change, sudden changes in mood, will, behavior, or thought because of bipolar disability, and chronic recurrent depression.<sup>19)</sup>

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19) As to main symptoms, attention shall be paid to the following [Rebecca Woolis (translated by Gang Byeong-cheol), *When Someone You Love Has a Mental Illness*, Summer Hill (2009), pp. 108-118, 131-133, Redacted in accordance with the judicial proceedings].

In cases where hallucination (auditory hallucination, visual hallucination) is experienced, the panel shall not act as if it is shocking or something serious has occurred, or speak, ignore or belittle what the person with the disability experiences as not real.

- In the event of paranoia, no attempt shall be made to argue or give conviction to get out of paranoia. If paranoia contains a strong feeling, the paranoia shall not be mentioned and the feeling (fear, anxiety, anger, sorrow) shall be acknowledged or focused on. It could be asked as “What do you think would make you feel relieved?”
- When a person with a mental disability is in a state of anger, the bench shall maintain control, behave as calmly as possible and speak in a slow and clear way. The bench shall ensure the person with a mental disability is able to leave their place without difficulty and pay attention so that other people,

The bench shall not proceed with judicial proceedings with prejudice and misunderstanding to the effect that “all people with mental disability are dangerous.” In particular, it is important to respect people with mental disability and to bear in mind the fact that they may have low self-esteem due to such social prejudice or misunderstanding.

## G. Internal Organ Disability

Internal organ disability such as kidney failure, heart failure, respiratory organ failure, liver failure, and ostomy disability refers to a restriction of everyday living caused by dysfunction of the relevant internal organ. Such restriction may take the form of the need for continuous hemodialysis or peritoneal dialysis, difficulty with physical activity beyond a certain intensity, chronic coughing or hemoptysis, breathing problem, need for frequent resting or recovery compared with others, etc.

People with an internal organ disability are not particularly different in appearance from people without an internal organ disability. Thus, the need

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such as the spectators, etc. are not hurt.

- Violence is most feared by people without disability but is the most unlikely outcome as well. The likelihood of violence may be examined against the history of the person with a disability. If a person with a mental disability has never used violence, it is not likely that he/she will do so in the future. Even if a person with a mental disability has used violence in the past, it is not likely that he/she would do that in the future provided that he/she has taken medication for 5 years during which he/she did not use violence. If a person with a mental disability recently suffered from an auditory hallucination urging him or her to beat others and thus became violent abruptly, it is likely that he/she will do that in the future. The bench shall check such history and state in advance. In all cases, the safety of the bench and other people in a courtroom shall be comprehensively considered. Where it is determined that a person with a mental disability is out of control and the bench and other people are at risk, the bench shall consider leaving the courtroom with other people quickly and then receiving assistance from court security, security management staff, etc.



for judicial assistance for people with internal organ disability is likely to be underestimated. However, since people with an internal organ disability are severely restrained in their daily lives due to their disability, court appearance and testimony itself may be very burdensome and risky.

If a person with an internal organ disability participates in a court trial for an excessively long time or at an unreasonable frequency, his/her bodily function may be severely damaged, which may even put his/her life at risk. During a trial, it is important to correctly understand and discern the state of a person with an internal organ disability, and continue to communicate and closely observe his/her physical state.

For example, a person with severe renal impairment who is under hemodialysis usually visits hospital 3 times a week (Monday, Wednesday and Friday or Tuesday, Thursday and Saturday) and receives hemodialysis for 4 hours per visit. If attendance in court is required on the day of dialysis, it would create difficulty for a person with severe renal impairment due to electrolyte imbalance, hypotension, anemia, etc. And given the time required to move to a hospital or the time during which dialysis facilities are available, the time window during which a person with renal impairment could attend a courtroom is restricted.

When designating a trial date, a space needs to be prepared in which a person with renal impairment could receive peritoneal dialysis. Peritoneal dialysis is performed as follows: a person with renal disability is injected with dialysate into his/her peritoneal cavity through a conduit permanently inserted into the cavity; and dialysis is conducted, as the dialysate contacts blood through this capillary network. It takes about 30 minutes to exchange dialysate by draining the solution remaining within the peritoneal cavity and injecting new peritoneal dialysate every four to six hours.

Since many people with renal impairment suffer from diabetes,

their blood sugar falls abruptly and thus they may suffer from hunger, tremble, chills, cold sweats or even fainting. Thus, it is required to train in emergency response actions (including candy, honey, juice, etc. kept at hand). However, where consciousness becomes dim, the foods and drink may enter the respiratory tract and damage the lungs. Thus, the person with renal impairment shall not be forcibly given food or drink, and a report shall be made to 119. Most patients with renal impairment are exposed to hyperkalemia and thus may be subject to paralysis in the middle of a trial. In such cases, the person with renal impairment may end up dying if dialysis is not promptly performed. It is required to provide training in advance to inform workers of the fact that it is required, in case of collapse from paralysis, to report to 119 and move to a dialysis hospital nearby. If a person with renal impairment could not receive hemodialysis or peritoneal dialysis due to unreasonable trial schedules, grave consequences, including death, may ensue. Thus, it is important to hear the free and genuine opinion of the person with renal impairment when setting the next trial date or time.

Also, if a person with respiratory organ failure is not medically treated for abrupt respiratory distress at the right moment, his/her life may be threatened. If a person with respiratory organ failure appears in a court with his/her portable respirator attached, he/she may pass away in the event of its failure unless an emergency measure is performed promptly and appropriately. It is necessary to check in advance whether he/she will carry an emergency portable oxygen tank or discuss how to cope with emergency, etc.

The court needs to avoid rush hours when setting court dates for people with an internal organ disability, ensure sufficient time and place for resting during proceedings, and ensure that the person providing aid is able to protect and care for the person with disability, and provide a temporary assistant, if necessary. Internal organ disabilities vary in terms of type and degree, which

means diverse forms of assistance are required. The court should identify the relevant requirements in advance to provide the optimal assistance.

## **H. Multiple Disabilities**

Two or more of the disabilities listed above may manifest at the same time in the form of “multiple disabilities.” A person with multiple disabilities needs to be provided with a combination of assistance appropriate for each disability type. Some cases may require an entirely new type of assistance, rather than just a simple combination of different forms of assistance. For example, a screen reader program, sign language, or an optical character reader are meaningless for a person with both visual and hearing impairment; such person requires braille, braille data terminal, paperless braille terminal, tactile sign language (communicate by contacting sign language with hands), close sign language (in case of remaining vision, communicate by watching sign language in a close distance) or communication by tracing letters on one’s palm. Also, since a person with both visual and hearing impairment may express himself/herself in varying ways and with varying levels of aptitude depending on the communication training that he/she has received, one must not conclude hastily that a person with multiple disability cannot communicate. It is necessary to come up with a plan that supports a specific person with a disability who needs judicial assistance in expressing his/her opinion as much as possible by figuring out the state of his/her disability.

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## 5 Procedures for Request and Provision of Judicial Assistance for People With Disabilities

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Judicial assistance for people with disabilities may be provided by the court without a specific request, or may be provided following a request from the person with a disability. In actual proceedings, the most common practice would be the latter, in which where a person with a disability applies for judicial assistance that he/she requires, and the court, upon receiving such request, reviews the necessity and details of such assistance and determines whether the requested assistance should be provided.

Neither the Civil Procedure Act nor the Criminal Procedure Act has specific provisions on request and provision of judicial assistance for people with disabilities. The Civil Procedure Act, however, applies the provision on expert witnesses to such cases in which an interpreter is appointed for a person with a hearing or speaking impediment (Article 143(2)). Therefore, Article 337 of the same Act (challenge against expert witness) applies to a motion for challenge against an interpreter. The Criminal Procedure Act also grants the right to challenge an interpreter by applying the provisions on challenging court officials to interpreters (Article 25 of Criminal Procedure Act).

The Act on the Prohibition of Discrimination Against Persons With Disabilities expressly provides for the right of a person with a disability to request and apply for the provision of legitimate convenience. Article 26(5) of the Act on the Prohibition of Discrimination Against Persons With Disabilities stipulates that “if a person with a disability requests the provision of reasonable accommodation, such as creating and providing forms that he/she can recognize and fill out on his/her own, for participating in

judicial and administrative procedures and services, no public institution or its employee shall put the person with a disability at a disadvantage by denying or arbitrarily processing such request,” prescribing the right to legitimate convenience regarding judicial procedures or services from the court. In addition, according to Paragraph 6 of the same Article “a judicial institution shall confirm whether a person related to a case has a disability in communication or expression of opinion, and inform such person with a disability of the fact that he/she may receive assistance in criminal proceedings and of the details of such assistance. In such cases, if the relevant person with a disability requests assistance in criminal proceedings, the institution shall not refuse such request without good cause and take necessary measures therefor.” This provision makes it the court’s responsibility to determine disability, and provide guides related to judicial assistance for people with disabilities, granting a more enhanced right to request convenience. Moreover, there are other provisions granting specific rights to seek remedy for discriminatory acts prohibited under the Act on the Prohibition of Discrimination Against Persons With Disabilities: the right to file complaints with the National Human Rights Commission (Article 38), the right to request a corrective order (Article 43(1)), the right to request appropriate interim measures from the court (Article 48(1)), and the right to request proactive measures to rectify a discrimination from the court (Article 48(2)). Some argue, however, that when these provisions are taken together, a request for legitimate convenience made by a person with a disability should be regarded as the individual exercising his/her statutory rights, rather than asking the court to exercise its authority.

When serving a duplicate of a complaint or bill of indictment, it would be desirable for the court to serve, together with the guide on judicial proceedings, the Guide on Judicial Assistance (Convenience Provision) for

People With Disabilities that introduces the details of the judicial assistance provided for people with disabilities, procedures for applying for the judicial assistance, etc. The court needs to place the above Guide (refer to Annex 1), the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities (refer to Annex 2), the Guide on Interpretation Service for People With Disabilities (refer to Annex 3), the Guide on Litigation Aid, etc., in the civil affairs office and other places, and make them available from the court's website.

The court may submit the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities (refer to Annex 2) to a clerk of the court, a judge of the panel, or employees or orally apply for judicial assistance. Where a request form for judicial assistance for people with disabilities is received, the court should include the request form in the case records or note such request down in the margin of records such as briefs, and indicate the details of assistance provided in the margin of the request form or the protocol.

Furthermore, even where there is no separate legal basis, the court provides allowance for a person who provides it with assistance in cases where a socially disadvantaged individual, such as a person with a disability, appears in the court as a party or a witness participating in the trial or proceedings for consensual divorce with the help of assistants. As a part of the necessary procedures, the "Request Form for Providing Allowance for Assistant" (Annex 5) shall be prepared. Such provision is not prescribed by laws, and may be subject to a certain degree of restriction (for example, the proceedings for consensual divorce are available only in family and district courts in the metropolitan area), due to budget, etc. Thus, it is required to ask each court regarding its provision criteria. The standards for "Wage for Assisting Activities of People With Disabilities" determined by the Ministry

of Health and Welfare shall be applied (as of 2019, KRW 12,960 per hour). When assistance is to be provided shall be determined by the bench in light of movement time, etc. However, where a person with a disability receives an allowance for supporting activities or another similar allowance under the Act on Welfare of Persons With Disabilities or other laws and regulations, he/she will be excluded from the provision of such in order to prevent him/her from being provided the fee in duplicate. Thus, a recipient (person with disability, etc.) shall prepare the Confirmation Form (bottom of Annex 5) that verifies that he/she is not provided with similar allowances, such as allowance for supporting activities.

# Judicial Assistance in Civil Proceedings

- \_\_\_ 1. Reception, Complaint Review, and Service
- \_\_\_ 2. Utilization of the Litigation Aid System
- \_\_\_ 3. Proceedings on Trial Date
- \_\_\_ 4. Pronouncement of Judgment
- \_\_\_ 5. Compromise or Conciliation Procedures







## II

### Judicial Assistance in Civil Proceedings

## 1 Reception, Complaint Review, and Service

### A. Reception

To ensure proper judicial assistance for people with disabilities in civil proceedings, the specific disability and the degree thereof need to be identified as early as possible, and the trial bench should be provided such information in a timely and accurate manner.

#### 1) Verification of Disability and Information on Judicial Assistance Procedures

Article 26(4) of the Act on the Prohibition of Discrimination Against Persons With Disabilities specifies that “each public institution or its employees shall provide judicial and administrative procedures and services to the extent that persons with disabilities can use them on a substantially equal basis with persons without disabilities, and shall provide appropriate accommodation for that purpose.” Paragraph 6 of the same Act provides that “a judicial institution shall confirm whether a person related to a

case has a disability in communication or expression of opinion, and inform such person with a disability of the fact that he/she may receive assistance in criminal proceedings and of the details of such assistance. In such case, if the relevant person with a disability requests assistance in criminal proceedings, the institution shall not refuse such request without good cause and takenecessary measures therefor.”The purpose of these provisions is to ensure that the specific disability and the degree thereof are identified in a person involving in a case, such as the plaintiff and the defendant, witness, expert, etc., as early as possible for the proper provision of judicial assistance, thereby prohibiting discrimination based on disability in judicial proceedings and ensuring thatpeople with disabilities have equal access to judicial procedures.

In this regard, the court needs to place the followingsin the civil affairs office: the Guide on Judicial Assistance (Convenience Provision) for People With Disabilities (refer toAnnex 1), which contains information on the contents ofjudicial assistance for people with disabilities and the request procedure therefor;the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities (refer toAnnex 2);the Guide on Interpretation Service for People With Disabilities (refer toAnnex 3);the Guide on Litigation Aid, etc. (each form can be easily found using the tree menu under the trial affair system in the integrated trial assistance system). A person with a disability provides his/her personal information and indicates the assistance required in the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities placed in the court or downloaded from a website of the court,<sup>20)</sup> and submits the form along with

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20) The Guide on Judicial Assistance (Convenience Provision) for People With Disabilities, the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities and the Guide on Interpretation Service for People With Disabilities can be downloaded from the website of the Electronic Civil Service Center under the Court of Korea.

other documents, including the complaint, to the clerk.

To the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities, a person with a disability may attach other documents showing the details and status of such disability (a copy of the person with disability registration; a medical certificate with name of disease, etc. in the case of a temporary disability), and the court may request such supporting documents if required to determine whether to provide judicial assistance. These supporting documents can be used to determine the need to provide litigation aid and the scope of such aid, in the event that the person also applies for litigation aid. Requests for supporting documents, however, need to be kept to a minimum, because the purpose of such a request is to determine disability or the appropriateness of a request for judicial assistance. Therefore, if it is evident that the applicant has a disability, and the assistance requested is not grossly unreasonable, the court may determine the judicial assistance without asking for supporting documents.

Given that it currently is not widely known that the courts provide judicial assistance for people with disabilities, they are not likely to request judicial assistance on his/her own. For this reason, the court needs to check whether a party requires special needs. Upon complaint or defense filed, the court clerk should check for a possible disability by asking him/her or those who file on behalf of the party the following: whether he/she had difficulty in coming to the court building or using the stairs; whether he/she has difficulty in expressing his/her own opinion, reading documents, listening to sounds or talking to others.

However, while verifying the existence of disabilities, attention shall be paid so that the party with disabilities does not feel ashamed due to his/her disability by clarifying the fact that the question is being asked to confirm the need for judicial assistance. In addition, the clerk, upon verification of the

restriction or disability of access and mobility, communication, judgment, etc. of the party, should provide the guide on judicial assistance for people with disabilities and leave a note indicating the name of the party and the type and degree of disability on the documents to inform the bench of the facts.

## 2) Measures to Be Taken Upon Verification of Disability

### A) Measures for Each Type of Disability

The court clerk, upon verification of the type and severity of disabilities, should provide judicial assistance that is immediately available for the party. For example, written conversation should be used when communicating with a person with a hearing impairment who is capable of written conversation, and the clerk should provide a person with visual impairment requiring a magnifying glass or a person with hearing impairment requiring a hearing aid with a magnifying glass or a hearing aid if there is any available in the court. When a person with a disability who has difficulty moving—such as a person with a visual impairment—requests assistance with moving between a bus stop or station and the court or within the court building, an assistant for persons with disabilities or a temporary assistant (appointed from among security guards, contract workers, public service workers, or volunteers) should provide assistance. For movement within the building, an officer or a security guard may be assigned to provide assistance.

### B) Delivery of Disability-related Information

Upon verification of disability, the clerk should provide the trial bench with accurate information about the party with a disability through notes or other appropriate means. Provision of judicial assistance may be facilitated by constructing a computer system for storing information on cases involving parties with disabilities and requests for judicial assistance, insofar as such

collection is not misunderstood as an unnecessary collection of personal information.

## **B. Complaint Review**

### **1) Complaint Review by Court Official**

Once a complaint is filed with a court and assigned to a trial bench, the court official of the bench should check whether any of the parties has a disability through the Request Form for Judicial Assistance for People With Disabilities attached to the submitted document or other documents such as the complaint. In cases where a person whose disability has been verified via the documents has not made any request for assistance, it is possible that the person has not been properly informed of the judicial assistance provided by the court. In such a case, the court official needs to provide the party with information on judicial assistance by a proper means (sending a Guide on Judicial Assistance for People With Disabilities or a Request Form to the party, or explaining the relevant procedures via telephone). In addition, if the defendant is identified as a person with a disability during the complaint review, the party should be informed of the judicial assistance procedures, so that assistance can be provided before he/she receives duplicates of the complaint. In cases where a person with a visual impairment is not aware of the fact that the document served is the duplicate copy of the complaint from the court, the court might render judgment without holding any pleadings because of a failure to submit the defense.

In cases where a party has requested judicial assistance, the type of disability the party has should be noted on the cover page of the case records, so that the presiding judge may be informed of the situation and provide

the required assistance. If a complaint filed electronically is unreadable by a screen reader, it would be advisable to order the party to amend it to the effect that an electronic file readable by the screen reader shall be submitted.

## **2) Procedures, etc. Related With Request of Judicial Assistance for People With Disabilities and Provision of Assistance**

In cases where a request for judicial assistance is made before the first trial date, such as when the Request Form for Judicial Assistance for People With Disabilities is filed along with the complaint, the trial bench in charge should determine whether to provide assistance without delay (no later than the argument date or the date for preparation of argument), and arrange checkboxes in the margin of the Form so that the presiding judge can check to indicate whether it was “provided,” “partially provided” or “not provided.” In cases where such request is made (oral requests included) on the argument date (or preparation date) or the answer to such request is to be provided on the trial date, such request and measures taken should be recorded in the protocol. Considering the constitutional requirement of ensuring the right to meaningful participation in court proceedings by people with disabilities, as well as Article 26(4) of the Act on the Prohibition of Discrimination Against Persons With Disabilities that prescribes the court’s obligation to provide convenience for them, such conveniences should be provided for people with disabilities unless the current situation does not allow for the preparation of auxiliary facilities, auxiliary equipment and assistants, or the case itself clearly does not require the judicial assistance requested.

## **3) Litigation Capacity of People With Mental Disabilities**

Litigation capacity refers to a party’s ability to conduct proceedings or

to be subject to proceedings from the other party or the court. Since litigation ability refers to a litigant's competency required to conduct procedural acts, it is not needed when involved in a litigation as a witness or a representative rather than as a party. Litigation capacity of people with disabilities may be at issue in some cases, especially when the case involves people with mental disabilities, including people with a developmental disability.

### **A) Investigation of Litigation Capacity**

To determine the litigation capacity of a party with a mental disability, it should be verified whether an adjudication to commence adult guardianship or limited guardian was provided for the party, or whether the party has the capacity to act. Because litigation capacity is one of the prerequisites for litigation which the court should investigate *ex officio*, a party does not have to confirm whether he/she has the capacity to stand trial. However, as litigation capacity is not subject to the court's *ex officio* detection, the court is not required to investigate the evidence *ex officio*. It only needs to request the party arguing for the validity of the procedural act or his/her legal representative to prove the party's litigation capacity.

#### **(1) People Declared Incompetent or Quasi-incompetent**

Article 51 of the Civil Procedure Act provides that "unless otherwise prescribed in this Act, the capacity for being a party, the litigation capacity, the granting of authorization required for the legal representation of, and for the litigation for, the persons lacking litigation capacity, shall be governed by the Civil Act and other Acts." In addition, according to Article 55 of the former Civil Procedure Act (prior to its revision to Act No. 13952, on February 3, 2016), "a minor, a quasi-incompetent person, or an incompetent



person may conduct procedural acts only through his/her legal representative. This is provided that the same shall not apply to cases in which a minor or a quasi-incompetent person is able to independently conduct juristic acts.” Article 55 of the Civil Procedure Act revised on February 3, 2016 stipulates that a minor or an adult ward may conduct litigation only through his or her legal representative (Paragraph 1), and a person under limited guardianship may conduct litigation only through his or her limited guardian having the right to representation if such acts are subject to consent of the limited guardian (Paragraph 2).

In response to the criticism that the Civil Act uniformly restricts the capacity of incompetent or quasi-incompetent people, a partial revision of the Civil Act was promulgated on March 7, 2011, and enforced on July 1, 2013. The revision involved the adoption of adult, limited, and specified guardianship,<sup>21)</sup> the expansion of the capacity of person with limited capacity,<sup>22)</sup> personal information protection regarding welfare, treatment or dwelling of wards, adoption of provisions on corporation guardian or multiple guardians, individual determination of the scope of the power to consent or represent, adoption of a supervisor of guardianship, adoption of a guardianship contract, and adoption of guardian registration for the

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21) This revision replaced the previous incompetent or quasi-incompetent person system with a more proactive social welfare system of adult guardianship, limited guardianship and specific guardianship, and added “supervisor of guardianship” and “head of a local government” to the list of those who hold the right to apply for guardianship. This revision improved the guardianship system in a more meaningful way and introduced enhanced protections for older people and people with disabilities requiring adult guardianship (Articles 9, 12, and 14-2 (newly added), Civil Act).

22) According to the revised Act, any juristic act necessary for everyday life, such as the purchase of daily necessities, should not be canceled by an adult guardian. In addition, the juristic acts of limited wards are recognized as valid juristic acts unless the Family Court decides that such acts require consent from the limited guardian, and the juristic acts of specific wards are not subject to any legal restriction (Articles 10 and 13, Civil Act).

protection of third parties.<sup>23)</sup>

The Addendum to the revised Civil Act (Article 2(2) of Addendum No. 10429) specifies that when the adult guardianship, limited guardianship or specific guardianship for an incompetent or quasi-incompetent person commences under the revised Civil Act or a supervisor of voluntary guardianship is appointed under the revised Civil Act, or when five years have elapsed after the revised Civil Act enters into force, the declaration of such incompetency or quasi-incompetency shall lose its effect. Accordingly, existing declarations of incompetency or quasi-incompetency will lose their effect on or after July 2, 2018. Thus, if a person with a mental disability was declared to be incompetent or quasi-incompetent but the commencement of adult guardianship or limited guardianship was not adjudicated, it shall not be concluded, based only on the fact that he/she was declared to be incompetent or quasi-incompetent, that he/she lacks litigation capability, but shall be determined by additionally examining the existence thereof.

## **(2) People With Mental Disabilities Subject to Adult Guardianship or Limited Guardianship**

### **(a) Adult Ward**

An adult ward with a mental disability could not be a party of litigation, except an “irrevocable juristic acts of adult wards” determined by the Family Court (Article 10(2) of the Civil Act). An adult ward may conduct litigation only through his or her legal representative (Article 55(1) of the Civil Procedure Act).

As to whether to acknowledge that an adult ward may conduct litigation

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23) In addition, to ensure the safety of transaction and protect a third party conducting business with an adult ward, the revised Act provides for registration and public notification of guardianship contract, etc. (Articles 959-15, 959-19, and 959-20 (newly added), Civil Act).

for a juristic act necessary for everyday life and the price for which is not excessive, such as the payment of utility bills, use of restaurant or public transportation, purchase of daily necessities (Article 10(4) of the Civil Act), the following views conflict: a view affirming that an adult ward may conduct litigation; and a view denying that an adult ward may conduct litigation in accordance with the stability of judicial proceedings.

#### (b) Person Under Limited Guardianship

While a person with a mental disability under limited guardianship may conduct litigation in an independent and valid way, he or she may conduct litigation only through his or her limited guardian “having the right to representation” if the “juristic acts are subject to consent of the limited guardian” (Article 55(2) of the Civil Procedure Act). Article 949(1) (“A guardian shall manage the ward’s property and represent the ward in juristic acts concerning the latter’s property”) of the Civil Act shall apply *mutatis mutandis* to a limited guardian under Article 959-6 of the same Act. However, even if a limited guardian is appointed, he/she does not have the right to represent a person under limited guardianship. A limited guardian shall become a legal representative of a person under limited guardianship only within the scope or matters for which a right to representation is assigned through adjudication of the Family Court (Article 959-4(1) of the Civil Act). Where protection by representation is needed after declaring the limited guardianship, it could be adjudicated to additionally assign the right to representation, even if it is not adjudged to assign a limited guardian with the right to representation, when adjudging the declaration of limited guardianship.

Therefore, when determining whether a limited ward with mental disability may conduct juristic acts on his/her own in a specific case, the court

should first look into the scope of acts requiring the consent of the limited ward, as indicated in the guardianship registration, and then determine whether a specific act falls within the scope.<sup>24)</sup>

### (c) Status and Scope of Right of Legal Representative

An adult guardian with a right to representation shall become a legal representative of an adult ward (Article 938 of the Civil Act) and a limited guardian with a right to representation shall become a legal representative of a person under limited guardianship (Article 959-4(1) of the Civil Act). A legal representative may, in principle, conduct all litigations that the party himself/herself may conduct. Furthermore, Article 56(1) of the Civil Procedure Act primarily provides that a legal representative may conduct litigation in regard to a lawsuit or appeal filed by the other party, even without being specially authorized by a supervisor of guardianship. However, a legal representative shall obtain a special authorization from his or her supervisor of guardianship to effect the withdrawal of a lawsuit, compromise, waiver or recognition of a claim, or a withdrawal under Article 80 of the Civil Procedure Act. Where a legal representative has no supervisor of guardianship, he/she shall obtain such special authorization from the Family Court (Article 56(2) of the Civil Procedure Act).

### **(3) When Not Adjudged on Commencement of Adult or Limited Guardianship**

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24) Article 25 (1) 6 of the Act on Guardianship Registration provides that the Family Court should include the following information in the guardianship registration: a) the scope of acts requiring consent from the limited guardian, if such scope has been determined, and the changed scope of such acts, if the scope has been changed; b) the scope of the authority of all legal representatives, if such authority has been given, and the changed scope of such acts, if the scope has been changed; and c) the scope of the authority to decide on personal affairs of the limited ward, if such scope has been determined, and the changed scope of such acts, if the scope has been changed.

Where a person with a mental disability is not adjudged on the commencement of adult or limited guardianship, or where a person with a mental disability is adjudged on the commencement of limited guardianship but he/she conducts litigation without the consent of said limited guardian, such litigation becomes invalid provided he/she lacks the litigation capacity. In such cases, it becomes an issue under what standards the litigation capacity of a person with mental disability shall be determined.

Therefore, mental capacity is a crucial criterion for determining the litigation capacity of a person with a mental disability. Mental capacity refers to “mental competency or intellect to form reasonable judgment on the result or meaning of his/her own acts based on normal perception and reasoning” (refer to Supreme Court Decision, 2001Da10113 of October 11, 2002). However, there is no official and unilateral criterion to determine whether a person is competent to form judgment. Therefore, such competency should be determined for each specific case in relation to a specific procedural act (refer to Supreme Court Decision, 2001Da10113 of October 11, 2002). In fact, the same person found to be competent to form judgment in one case may be found to be incompetent in another, depending on the specific act in question. Whether a procedural act is invalid on account of the actor’s mental capacity cannot be determined based on a unilateral criterion.

Where litigation is conducted against a person with mental disability who is not adjudged on the commencement of adult guardianship but loses his/her mental capacity as a matter of fact or where the person is necessary to conduct litigation, his/her relatives, interested party, head of local government, prosecutor, specific guardian or arbitrary guardian may request with the court of litigation to appoint a special representative (Article 62-2(1) of the Civil Procedure Act). However, where a special representative effects withdrawal of a lawsuit, compromise, waiver or recognition of a claim, or a

secession under Article 80 of the Civil Procedure Act, the court may decide not to permit such act within 14 days from the date such act is effected if it is deemed clearly contrary to the principal's interests (Article 62-2(2) of the Civil Procedure Act).

## **B) Effect of Defects in Litigation Capacity**

Procedural acts conducted by a person lacking litigation capacity, or an attorney delegated the case by a person lacking litigation capacity, or procedural acts of the court or the other party against a person without litigation capacity are all invalid. In cases where the party who acquired litigation capacity or his/her legal representative ratifies them, such procedural acts retroactively take effect at the time when they were conducted (Article 60 of the Civil Procedure Act).

If any defect in litigation capacity exists at the time of filing the lawsuit, and such defect cannot be corrected, the lawsuit should be dismissed for lacking the legal requirements. However, because dismissing all lawsuits on account of such defect would undermine the economy of litigation and adversely affect the parties, the court may order the correction of such defect within a fixed period; or, where there is any concern about causing damages by a delay in correction, the court may allow the party or legal representative to temporarily conduct the litigation (Article 59 of the Civil Procedure Act). However, "where there is any concern about causing damages by a delay in correction" refers to cases where there exists any concern that a party to litigation is damaged, but not cases where there exists any concern that the other party is damaged. Thus, an order of revision against the plaintiff who institutes litigation against a legal representative devoid of mental capacity or authority is not an order of revision under Article 59 of the Civil Procedure Act. If a person who had litigation capacity at the time of filing the lawsuit

subsequently loses such capacity, proceedings should be interrupted (Article 235 of the Civil Procedure Act).

A party suspected of lacking litigation capacity may withdraw the lawsuit that he/she filed, or file an appeal against a final and conclusive decision by the court. Therefore, the period of appeal effectively proceeds when a party lacking litigation capacity is served the decision to dismiss a lawsuit due to said lack of litigation capacity. A court decision based on defective litigation capacity may be subject to regular appeal, as well as petition for a retrial after such decision becomes final and conclusive (Articles 424(1)4 and 451(1)3 of the Civil Procedure Act). However, there will be no grounds for appeal or retrial when there has been ratification after the adjudication of the decision (Articles 424(2) and 455 of the same Act).

### **C) Appointment of Special Representative**

Where a minor, a person under limited guardianship, or a person under adult guardianship is a party, a relative, an interested party (including a person who intends to conduct litigation against a minor, a person under limited guardianship, or a person under adult guardianship), an adult guardian having no right to representation, or a limited guardian having no right to representation, the head of a local government or a public prosecutor may file with the court of lawsuit a request to appoint a special representative by vindicating that there exists a concern about the damage to be inflicted by a delay in the litigation procedures, in any of the following cases: where the party has no legal representative or his or her legal representative has no power to act as his or her representative in the litigation procedures (Subparagraph 1); where the legal representative is unable to exercise his or her power of representation due to a factual or legal impediment (Subparagraph 2); or where the litigation process is seriously impeded due

to the legal representative's insincerity or inexperience in exercising his or her power of representation (Subparagraph 3)(Article 62(1) of the Civil Procedure Act). This applies to circumstances where a person with a mental disability who is a person under limited guardianship or an adult ward is actively conducting litigation, or is conducting litigation against a person under limited guardianship or an adult ward. The following may constitute "factual impairment" under which a legal representative cannot exercise his/her right to representation: where the location of a legal representative is unknown; or where the legal representative is taking a long trip, etc. The "legal impairment" may be acts of conflicting interests, etc. under Articles 949-3 and 921 of the Civil Act. The "concern about the damage to be inflicted by a delay in the litigation procedures" refers to where the statute of limitations would be completed, once an opportunity is lost, where it is required to render provisional attachment or preliminary injunction immediately, or where evidence would be scattered and lost once the judicial proceedings are suspended.

#### **D) Complaint with Defective Indication of Legal Representative**

A written complaint should contain the name of the parties and their legal representatives, and the gist and counts of the claim (Article 249(1) of the Civil Procedure Act). Because an incompetent or quasi-incompetent person generally lacks the capacity to conduct procedural acts on his/her own, he/she may file a lawsuit only through the legal representative, which means the complaint should indicate who the legal representative is. Where a person with mental disability who is an adult ward files litigation, the complaint shall specify an adult guardian who is a legal representative. However, a person with mental disability who is an adult ward may, in certain cases, conduct valid juristic acts in an independent and conclusive manner. In



such cases, litigation cannot be conducted through a legal representative. It may not be deemed that a limited guardian, unlike an adult guardian, will be a legal representative. If so, a complaint for a lawsuit filed by a limited ward cannot be deemed to violate Article 249(1) of the Civil Procedure Act just because the complaint does not indicate the legal representative. As previously mentioned, whether the relevant limited ward is allowed to conduct procedural acts without his/her legal representative should be determined on a case-by-case basis.

### **C. Service of Duplicate Copy of Complaint and Other Documents**

When serving a duplicate copy of a written complaint to a person with a disability, the Guide on Litigation Procedures should be served with the complaint, as well as a Guide on Judicial Assistance (Convenience Provision) for People With Disabilities (Annex 1), if the receiving party had been confirmed to have a disability at the time of receiving the complaint. The Guide on Litigation Procedures should include a phrase stating, for example, “A person with a disability may receive judicial assistance for people with disabilities. Please contact the court or visit the civil affairs office for further information.”

When the defendant, upon service of the complaint, requests judicial assistance pursuant to the Guide above at the time of submitting his/her defense or earlier, the trial bench should ensure that the subsequent procedures are implemented with judicial assistance.

For people with a visual impairment, judicial assistance with access to visual information is crucial. Therefore, a person with a visual impairment needs to be served the litigation documents in an available format chosen

by the party with a disability, such as a braille document, electronic files compatible with a screen reader program, 2D bar code for optical character reader, or print with magnified fonts.

Because the court may require a person who has submitted litigation documents to send the electronic files of such documents (Article 48(2) of the Regulation on Civil Procedure, Article 8(4) of the Rules on the Use, etc. of Electronic Documents in Civil Litigations, etc.), the court official should acquire such electronic files from the person who submitted the documents, and convert the electronic files into a format chosen by the party with a visual impairment, such as a braille document, electronic files compatible with a screen reader program, 2D bar code for optical character reader, or print with magnified fonts, and provide the converted document along with the hard copies of the documents. One related issue is how to deal with a request for assistance with litigation documents for which there is no electronic file, such as handwritten documents. It may be decided to create an electronic file of the documents in question if it is determined that such file can be created with relative ease using Optical Character Recognition (OCR) through the court department in charge of judicial assistance for people with disabilities, based on the totality of the circumstances such as the specific type of litigation, specific procedural stage, characteristics of the documents requiring conversion, the cost of such conversion, and the availability of assistance from the attorney or an assistant.

In cases where an attorney has been appointed for a party with a visual impairment, the service requirement is satisfied by delivering the relevant documents to such attorney. Even in such cases, the party with the visual impairment needs to read the documents himself/herself. Therefore, the party with visual impairment should be consulted regarding the type of assistance required and be provided with the requested assistance, if it is available.

Because service on an incompetent to stand trial shall be made to his or her legal representative (Article 179 of the Civil Procedure Act), the duplicate of the written complaint to be delivered to an adult ward should be served to the legal representative indicated by the complaint. However, the specific person to be served with the documents may change depending on the scope of litigation capacity of person under limited guardianship.

In cases where a defendant contests the claim of a plaintiff, he or she shall submit a written defence within 30 days from the date of receiving a service of a duplicate of the written complaint (mainbody of Article 256(1) of the Civil Procedure Act). A defendant with visual impairment may not realize that the document delivered is a duplicate of the complaint from the court; a defendant with a mental disability may fail to submit his/her defense if he/she does not understand the contents of the complaint or the Guide on Litigation Procedures. Therefore, the bench should take care not to proceed to judgment without a hearing just because the defendant failed to submit his/her defense, if the bench is aware that the defendant is visually impaired or has a mental disability. In some cases, the court may need to set a separate argument date to verify whether the defendant acknowledges the facts that gave rise to the plaintiff's claim.

The written judgment or other documents to be provided in subsequent proceedings may also be provided in the format requested by the party with a disability, along with the regular documents.

## 2 Utilization of the Litigation Aid System

The presiding judge may apply for litigation aid either upon request from a party or ex officio, if it deems that the use of the litigation aid system is appropriate in the present case, in accordance with Article 128 of the Civil Procedure Act. In addition, the Established Rule on Operation of Litigation Aid (Jaeil 2002-2) adopted a new provision on August 29, 2008, which is Article 22(1)4. The provision introduced a designated lawyer program for litigation aid for people with disabilities in individual bankruptcy or rehabilitation cases. Litigation aid may be performed, in individual bankruptcy cases, etc., not only for legal fees but also for service fees. Also, litigation aid may be performed ex officio for fees for appointing a bankruptcy administrator.

In order to ensure the meaningful right to judicial procedures for people with disabilities, in line with the original purpose of the Act on the Prohibition of Discrimination Against Persons With Disabilities, the requirements for litigation aid should be interpreted in a way that will expand the scope of litigation aid granted to people with disabilities.<sup>25)</sup> Litigation aid is granted only to a “person who falls short of the solvency to pay the costs of lawsuit” (main body of Article 128(1) of the Civil Procedure Act). According to Subparagraph 4 of Article 3-2 of the Established Rule on Operation of Litigation Aid, a recipient under the Disability Pension Act shall be deemed to fall short of the funds and the provision of litigation aid may be determined based only on the examination of other requirements.

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25) Other than litigation aid, the Korea Legal Aid Corporation and Legal Aid Foundation of the Korea Bar Association will provide an attorney to people with disabilities who meet certain conditions free of charge.

Furthermore, Article 2(2) of the Established Rule on Operation of Litigation Aid stipulates that “where the court determines that it would be appropriate to utilize the litigation aid system, such as the appointment of an attorney-at-law under Article 144(2) of the Civil Procedure Act, the party’s complaint of excessiveness of legal fees in a courtroom, etc., the panel shall endeavor to substantively guarantee the right to trial of the party who falls short of the funds by having the party request the litigation aid or granting the litigation aid ex officio.” Thus, the same shall be taken into consideration in a litigation of a person who seems to be lacking the ability to plead.

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## 3 Proceedings on Trial Date

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### A. Court Date Setting

After deciding to provide conveniences requested by a party with a disability, the court should set trial dates by identifying the times when such assistance is available. The presiding judge shall, if possible, give sufficient time to set and announce court dates in light of the possibility that a request for litigation aid and a request for judicial assistance (convenience provision) for people with disabilities may be submitted, and to take follow-up measures. Furthermore, the presiding judge should bear in mind that people with disabilities require more time for traveling (especially people with physical disabilities, people with brain lesion disability, and people with visual impairment) and avoid rush hours when setting court dates. In addition, the number of argument dates should not be excessive when the case involves any party with a disability.

Moreover, the bench should minimize the waiting time as much as possible, and the hearing should be scheduled to allow for adequate intervals between hearings, so that a sufficient amount of time can be assigned to each hearing. Additionally, people with severe physical disabilities or a brain lesion disability may find it difficult to sit in a wheelchair for a long time; a person with a mental disability may need an appropriate amount of rest because they easily lose focus; and hearings involving people with hearing impairment or brain lesion disability accompanied by speech impediment may take longer than other hearings.

For people with severe physical disabilities who are expected to use wheelchairs, if the court building is not prepared to accommodate such people

and it is difficult for them to access the courtroom that the bench in charge usually uses, the bench needs to assign another courtroom on the first floor or one with easy access. In such cases, the date of hearings involving a person with a disability need to be designated as a special date, and the bench in charge should consult with the benches using the courtroom on the first floor or a courtroom that is more accessible in advance.

## **B. Identification of Persons Involved**

The Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities filed by the party with a disability before the first trial date is the primary source for identification of the party's disability, its grade, and the required assistance. In cases where the party did not submit a Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities in advance but was found to have a disability on the trial date, the bench needs to inform the party (who may not be aware of his/her eligibility for assistance) that he/she may request judicial assistance. Therefore, if a party requests judicial assistance on the trial date, the presiding judge determines the necessity and availability of judicial assistance (if it can be determined at the time), and enters the purpose of the request and measures taken into the protocol. If it is difficult to determine the necessity and availability at that time, the presiding judge should first enter the purpose of the request into the protocol, determine the necessity and availability by the next trial date, and enter the measures taken in response to the request into the protocol.

Upon deciding to provide judicial assistance as requested, the bench should account for the time required to provide such assistance when setting the next court date. If the required assistance cannot be provided by the

next court date the bench has set, the bench should change the date. In cases where a sign language interpreter is appointed, the court should set the next court date on a later date, or allow a sufficient interval between the first and second court dates before designating an interpreter, so that the interpreter can be present on the court date.

People with mental disabilities, in particular, may not understand the details of conveniences and their necessity because of low intellect or thinking disability, and thus fail to make an appropriate request at the appropriate time. When this is the case, the bench should explain the types and details of judicial assistance required by the person and the procedures for making such request in a way that the person can easily understand. In some cases, the bench may have to provide judicial assistance ex officio.

## **C. Persons Related to Persons With Disabilities**

### **1) Persons Related to Persons With Disabilities and Assistants**

Many people with disabilities have difficulty with communication or expressing themselves. People with hearing impairment, brain lesion disability, or mental disability may feel isolated from the trial or have difficulty with communication if only sign language translation or written interpretation is provided. Ensuring meaningful participation in the proceedings and granting sufficient opportunity to make their cases sometimes requires assistance from other people.

Article 4(1)5 of the Act on the Prohibition of Discrimination Against Persons With Disabilities uses the term “persons related to persons with disabilities” to refer to individuals representing or accompanying persons with disabilities for the purpose of helping such persons (including guardians



or protectors of children with disabilities or other persons reasonably recognized to help persons with disabilities). In addition, Article 20(2) of the same Act specifies that “no person shall compel, interfere with, or treat unfairly persons related to persons with disabilities who support their communication, such as representing and accompanying persons with disabilities for the purpose of Korean sign language interpretation, braille conversion, braille proofreading, reading, ghostwriting or direction, without good cause.”

There are two main categories of people providing assistance with the participation of people with disabilities: the first category consists of people who provide assistance with communication, and the other category consists of people who provide assistance with movement, or relieve the anxiety felt by people with disabilities that they might be isolated from the proceedings. Many of the persons related to the people with disabilities are family members or relatives of people with disabilities who have been communicating with or assisting them for a long time. If a party with a disability requests permission to sit with a person related to the person with disabilities, the bench should allow it barring a reasonable ground for rejecting the request.

If there is no related person to represent or accompany the party with a disability, but he/she still requires someone to provide assistance with movement, participation, or psychological stability, the court needs to assign an assistant<sup>26)</sup> to provide such assistance to the party with a disability.

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26) While an assistant carries out the same roles as those performed by a “person related to persons with disabilities,” the former is different in that he/she does not accompany the person with a disability, and is provided by the court as a part of the court’s judicial assistance. Therefore, we will use the term “assistant” as distinguished from “person related to persons with disabilities.” Article 17 of the Enforcement Decree of the Act on the Prohibition of Discrimination Against Persons With Disabilities also provides that the court should provide an assistant upon request from a person with a disability to access or participate in judicial procedures or services.

Although it would be ideal to appoint a person with expert training in each type of disability and assistance required, the specific laws and systems for providing such experts have yet to be implemented. For now, court staff members will have to act as assistants where they can. An assistant for a party with a disability should also be allowed to sit with the party with a disability, barring special circumstances.

## 2) Statement Assistant

### A) Qualification and Court's Permission

Where a party has difficulty in making his or her statements necessary to clarify the litigation relations due to his or her mental or physical limitations caused by a disease, disability, age or the like, he or she may be accompanied by his or her statement assistant when appearing before the court to give his or her statements if the court so permits (Article 143-2 of the Civil Procedure Act). A person who has no disability of listening or speaking and is any of the following may become a statement assistant with permission of the court: a spouse, linear relative, sibling, or other cohabitant of the party with disability, and it is acknowledged as reasonable in light of the living relationship with the party; or, he/she is in contractual or fiduciary relationship and it is acknowledged as reasonable in light of his/her duties, etc. (Article 30-2(1) of the Regulation on Civil Procedure). Like an assistant of the party with a disability, "he/she is in... fiduciary relationship" may also become a statement assistant, provided that other requirements are met. However, a party who intends to appear in the court with his/her statement assistant shall file a written request for each instance (Article 30-2(2) of the Regulation on Civil Procedure). Where a party who has difficulty in preparing a document due to mental and/or physical restraints, such as disease, disability, age, etc. expresses his/her intention to appear on a trial date with his/her statement

assistant, it would be desirable to grant the party with an opportunity to be assisted with the statement assistant by providing information on how to prepare an application, and if necessary, examining whether to change or postpone the trial date, rather than to dismiss the application immediately.

The permission for statement assistance is granted at the discretion of the court. The court shall determine whether to permit the statement assistance by considering the following: mental or physical restraints and pleading ability of a party; pleading ability of the person who intends to assist the party in making statements; the relationship between the party and the statement assistant; the details, progress, etc. of litigation, etc. Even if the statement assistance is permitted, the court may revoke the permission at any time in light of the circumstances stated above, provided that the statement assistant is not appropriate or necessary for the case or the statement assistant has no ability to make the statements necessary to clarify the litigation relations (Article 143-2(2) of the Civil Procedure Act). However, sufficient measures shall be taken so that the Act on the Prohibition of Discrimination against Persons With Disabilities is not violated.

## **B) Status and Roles in Lawsuit**

A statement assistant who is permitted by the court may, on the date of pleading, sit with the party and engage in the following acts: mediating or explaining the party's statement to the court, the other party or other participants of litigation so that they could understand the party's statement; and, mediating or explaining statements of the court, the other party or other parties to the litigation so that the party could understand them (main body of Article 30-2(3) of the Regulation on Civil Procedure). The objects of mediation or explanation are not restricted to factual statements but also include the legal statements (including statements on the gist and cause of

claim, not only means of offense and defense but also waiver or recognition of the claim). Unless the party promptly revokes or corrects an act of the statement assistant, the statement indicated as final and conclusive shall have an effect on the party by being mediated and explained through the act.

However, a statement witness is only permitted to help the party appearing in the court with him/her to communicate his/her intention smoothly and conduct litigation in a valid manner. Thus, it is not permitted for a statement assistant to conduct litigation for the party or conduct litigation for the party with a legal representative or attorney. A statement assistant may not engage in litigation other than on the trial date, or have any right under judicial proceedings. The court does not need to separately notify a statement assistant of the trial date, etc.

When a statement assistant appears on the date of pleadings, the following shall be specified in the protocol: his/her name; and the purpose of mediation or an explanation of statement by him/her (Article 30-2(5) of the Regulation on Civil Procedure).

### 3) Guide Dogs and Auxiliary Equipment

Article 4(1)6 of the Act on the Prohibition of Discrimination Against Persons With Disabilities classifies an act that interferes with the rightful use of guide dogs or auxiliary equipment for people with disabilities as a discriminatory act. If a party with visual impairment brought a guide dog into the courtroom, the presiding judge should allow the dog to wait beside the party's seat, barring special circumstances such as the dog disrupting the proceedings. In addition, the dog may be subject to orders issued by the presiding judge to maintain order in the court, in accordance with Article 58 of the Court Organization Act. Moreover, as the auxiliary equipment used by a person with a disability is equivalent to the person's arms and legs, no

person should interfere with the rightful use of such equipment.

## **D. Assistance for Smooth Communication**

### **1) Necessity of Interpretation**

People with hearing impairment generally require sign language interpretation, written interpretation, etc. People with a brain lesion disability accompanied by speech impairment require assistance with communication. As a person with a brain lesion disability may have difficulty making himself/herself understood because of his/her physical disability, even when his/her speech itself is not impeded, such people need someone to help with communication— that is, a person related to the person with disabilities who can understand what the person with a disability says. On the other hand, if the speech impediment is not severe and the person can be engaged in a conversation by paying extra attention or by asking additional questions, the court should attempt direct communication, bearing in mind the considerations for people with physical disabilities or brain lesion disability (refer top.97 and below).

Even when a party's disability adds to the difficulty with communication, the bench should attempt to communicate directly with the party. It would not be an acceptable practice to refuse to listen to the party with a disability, telling him/her to file a written statement later if he/she has something to say.

### **2) Interpretation for Communication Assistance**

#### **A) Selection and Management of Interpreters**

By the end of every January, each court should prepare a list of two or more interpreters for people with hearing impairment or speech impediment

(Article 6 of the Established Rule on Interpretation). However, only a very limited number of interpreters are knowledgeable about legal terms or court procedures. When a person without expert legal knowledge conducts interpretation in a courtroom, it undermines the efficiency of the trial and may actually interfere with compliance with the due process, resulting in a wrongful decision in certain cases.

Therefore, the court should take extra care when designating an interpreter by investigating each candidate's experience, skill, and attitude in advance, even when the candidate is included in the list mentioned above.<sup>27)</sup> In addition, sign language interpreters on the list need to receive regular education on the overall legal proceedings and interpretation of legal terms (Article 7 of the Established Rule on Interpretation).

## **B) Procedure for Interpreter Designation**

### **(1) Decision to Designate an Interpreter**

When a party requests sign language interpretation, the court should determine its necessity and whether to provide interpretation service.<sup>28)</sup> When a party is confirmed to have hearing impairment and proficiency in sign language, the court may decide to provide interpretation service for the procedures ex officio, even without a request from the party.

When the court appoints a sign language interpreter, it needs to inform

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27) However, a judge or a court official is generally not trained to verify the accuracy of interpretation in the courtroom, even when he/she has doubts in that regard. A legal interpreter certification program, in which the court certifies an interpreter with certain training or education, knowledge on legal terms, and skill/qualification to conduct interpretation, would greatly contribute to ensuring fair court proceedings in cases involving parties with disabilities, provided that future reforms make room for such a system.

28) Barring special circumstances that cast doubt on a party's disability, the court should accept a party's request for sign language interpretation on the grounds that he/she has a hearing impairment. However, in cases where the court can dismiss a complaint or make a judgment without argument because of the nature of the case, the court does not need to set the first trial date. In such cases, the court does not have to appoint a sign language interpreter.

both parties of the professional record of the interpreter and listen to each party's opinion. In particular, where a sign language interpreter is not proficient at the natural sign language, designation of both a sign language interpreter and a sign language interpreter with hearing impairment shall be considered.

Each court should, upon receiving a case for which interpretation service is not available (because of the lack of a natural sign language interpreter, etc.), notify the Minister of National Court Administration (via the Chief of Judicial Procedure Office) of such fact, and the Minister of National Court Administration (the Chief of Judicial Procedure Office), upon receiving such notification, should find an appropriate interpreter and notify the court (Article 8, Established Rule on Interpretation).

Since Article 143(2) of the Civil Procedure Act applies *mutatis mutandis* provisions concerning expert witnesses to the interpreters, an interpreter shall be designated by the court of a lawsuit, a commissioned judge or an entrusted judge (Article 335 of the Civil Procedure Act).

## **(2) Accompanying Interpreter and Designated Interpreter**

In some cases, a party with a communication disability may be accompanied by an interpreter who is a member of the party's family, an acquaintance, or a volunteer (when the court designates such accompanying person as an interpreter, he/she is called "accompanying interpreter"). An accompanying interpreter offers the benefit of easy communication because he/she is familiar with how the party with a disability uses sign language. However, most lack expert training, there are significant gaps in interpretation skill among them, and they usually do not have enough legal knowledge. In addition, an accompanying interpreter who is a member of the party's family or a relative may attempt to step out of the role of interpreter and distort the

party's statements by modifying or adding to them.

On the other hand, a sign language interpreter designated by the court (hereinafter referred to as "designated interpreter") is certified by the court as having the requisite skills and qualifications, and he/she is less likely to try to step in to provide legal advice than an accompanying interpreter. However, such interpreter may not be familiar with the way that the party with a disability uses sign language, resulting in less efficient interpretation.

The trial bench should consider the above pros and cons of an accompanying interpreter and a designated interpreter, and carefully select the appropriate interpreter by listening to both sides' opinions. Because a sign language interpreter needs to have the basic skills, a professional attitude, and the capacity to stay neutral, the court should, in principle, designate a sign language interpreter from those on the court's sign language interpreter list. However, if the other party does not express any objection to the sign language interpreter accompanying the party with a disability, and such interpreter is found to have the necessary skills and attitude based on his/her professional record, the court should designate the accompanying interpreter as the interpreter for the case. In addition, if at any time during the proceedings an accompanying interpreter or a designated interpreter's skill or neutrality comes into question, the court should issue an order to replace the interpreter.

Even if the court does not designate a person accompanying the party with a disability as the interpreter for the case, it would be desirable for the court to permit the person as a statement assistant unless there is any justifiable reason not to, provided that a request for permitting a statement assistant is made in writing. Otherwise, such accompanying person should be allowed to sit with the party with a disability as a related person to provide assistance with communication, unless the person interferes with



the fair proceeding of the court procedures, poses a risk thereof, or there is any other justifiable reason to exclude the person. The Act on the Prohibition of Discrimination Against Persons With Disabilities includes restriction, exclusion, separation, or rejection of a person representing or accompanying a person with a disability as a discriminatory action against people with disabilities.

In addition, the question arises as to the extent to which the court should allow a person related to the person with disabilities to point out errors in the interpretation of a designated interpreter during examination. A person related to the person with disabilities is neither a party nor an attorney, which means he/she may not conduct procedural acts on his/her own. Therefore, the presiding judge should stop procedural acts by a person related to the person with disabilities, or ensure the appropriate level of participation by checking the party's genuine intention. It would be harmless, however, to allow a person related to the person with disabilities to intervene in the examination so far as he/she acts only to supplement the genuine intention of the party with a disability.

### **(3) Motion to Challenge an Interpreter**

When any circumstances exist under which an interpreter is unable to faithfully perform interpretation, the parties may challenge him. Provided, that when the parties have been aware of an existence of causes for a challenge before such an interpreter makes a statement on matters for interpretation, the parties shall not challenge him or her subsequent to a completion of his or her statement on the matters for interpretation (Articles 143(2) and 336 of the Civil Procedure Act). A motion for challenge shall be made to the court of a lawsuit, a commissioned judge, or an entrusted judge. No appeal shall be made against a ruling that a justifiable ground exists for a

challenge, whereas an immediate appeal may be filed against a ruling that the challenge is groundless (Articles 143(2) and 337 of the Civil Procedure Act).

## **C) Cautionary Notes for Interpretation**

### **(1) Documents to Be Given to a Sign Language Interpreter in Advance**

#### **(a) Interpreter Guide<sup>29)</sup>**

As a sign language interpreter may not have sufficient experiences and skills related to interpretation in the courtroom, the trial bench needs to notify an interpreter of general cautions and considerations specific to the present case.<sup>30)</sup>

#### **(b) Documents Related with Litigation**

The court should provide a sign language interpreter with a copy or summary of the complaint or defense, as well as the “Interpreter Guide,” to help the interpreter understand the case and perform interpretations smoothly. Such documents may be delivered to an accompanying interpreter through the party with a disability himself/herself.

Similarly, if records of examination of a witness or examination of parties had been submitted before the examination of a witness or the examination of parties, a duplicate or copy of such records needs to be provided to the sign language interpreter.

### **(2) Cautionary Notes for Sign Language Interpreter**

A sign language interpreter may arbitrarily change the question in

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29) Refer to Annex 4, Interpreter Guide.

30) As a handbook for sign language interpreters has yet to be published, for the time being, the court may use the general cautions and guidelines on various procedures contained in the Foreign Language Interpreter Handbook to help the sign language interpreter.

interpretation, or add his/her own opinion. To prevent this, the trial bench needs to advise the interpreter against such practice. Immediately after the interpreter takes an oath, the bench should orally confirm that the interpreter has read the contents of the Interpreter Guide that was previously given to him/her. In addition, the presiding judge should resolve any issues during sign language interpretation.

An interpreter should observe the following rules: maintain an objective and neutral position; voluntarily notify the bench of any special relationship with the party or witness and other circumstances preventing him/her from providing fair interpretation; refrain from having a personal relationship with the person for whom he/she provides interpretation service; refrain from expressing his/her own opinion when asked about the result of the trial or the appointment of a lawyer by the person to whom he/she is providing interpretation services; interpret what the bench or the party states, even if such statement is unreasonable or grammatically incorrect, without involving his/her own opinion; and notify the presiding judge when he/she is not capable of interpreting fast conversations or conversations with difficult legal terms so that he/she can perform interpretation based on an accurate understanding of the legal terms and phrases.

### **(3) Cautionary Notes for Litigants**

Guidelines related with the examination of parties or witnesses can be summarized as follows. These guidelines apply to all remarks and supplementary questions from the presiding judge, and all statements made by litigants and others within the courtroom.

- (a) Use Simple Questions, Alternating Between a Single Question and a Single Answer.

A prolonged statement of facts makes it difficult to perform sign language interpretation or elicit appropriate answers from the person with a disability. Therefore, questions during examination should be simple in form. When confirming previous statements during cross-examination, it should be made clear that the examiner is reconfirming statements previously made to eliminate the possibility of error or misunderstanding by the person answering the question.

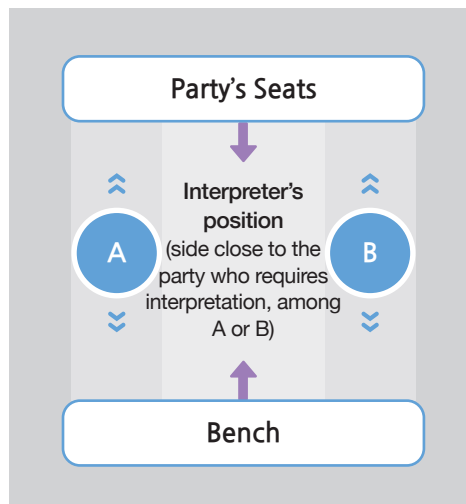
(b) Use Plain Terms and Expressions..

Rephrase difficult terms or phrases into more plain terms or expressions, and do not ask vague questions or questions that may have multiple meanings.

#### D) Seat Arrangement for Sign Language Interpreter, etc.

The seat of the interpreter should be arranged through a consultation between the interpreter and the person for whom the interpretation is to be performed. Because many people with hearing impairment read lips to understand the other person, the seat of the interpreter should be placed at a position that allows the person with a disability to see both the presiding judge and the interpreter, and the presiding judge can observe the translation—for example, at the middle, between the judge’s stand and the party’s seats where the person with a disability can look to both sides—to ensure smooth communication and

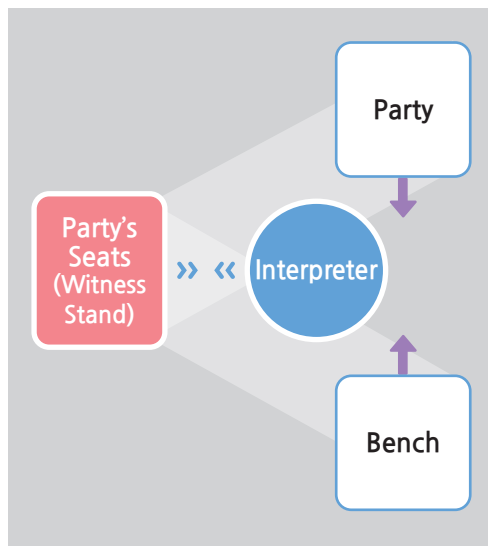
[Figure 1]



proceedings (Figure 1). The interpreter may sit on a witness seat or on a separate chair prepared for the interpreter.

When the person for whom the interpretation is being performed changes his/her position to the witness stand for examination, the bench should allow the person and the interpreter to decide their positions by consulting between themselves. For example, when a person with a hearing impairment moves to the witness stand for examination of parties, the sign language interpreter should move

[Figure 2]



to a position in which he/she sits face to face with the plaintiff at the witness stand (Figure 2). When a witness who is not a person with a disability is being examined, the sign language interpreter should turn his/her position slightly toward the party's seat so that he/she may interpret the examination, looking alternately at the witness stand and the plaintiff's seat.

When an spectator with a hearing impairment requests sign language interpretation, but it is difficult or unnecessary to designate a separate sign language interpreter, the sign language interpreter may turn his/her position slightly toward the spectator and perform interpretation.

### E) Oath Taken by Interpreter

Because a sign language interpreter may be subject to punishment if he/she performs false interpretation, the presiding judge should give a warning of the penalty for perjury before administering the oath (Articles 143(2), 338,

333, and 320 of the Civil Procedure Act).

Because interpretation of the entire proceedings is required to protect the right to participate in the proceedings of a party with a disability, the oath should be taken before the beginning of the trial. In addition, if a witness with a disability requires interpretation for communication, the interpreter may take the oath before the witness takes his/her oath.

Immediately after the sign language interpreter takes his/her oath, the presiding judge should clarify whether the sign language interpreter has read the Interpreter Guide and familiarized him/herself with the cautions therein. If the Guide was not provided in advance, the bench should inform the interpreter of the main points of the Guide.

## **F) Objection to Interpretation**

Article 14 of the Established Rule on Interpretation provides that “when a defendant who is a foreigner expresses an objection against the accuracy of interpretation, the bench shall have the same examination and interpretation repeated if the person examined is still in the courtroom. If the person examined is not in the courtroom, the interpreter should be given a recording of the examination and perform interpretation again to clarify whether the interpretation matches what is recorded in the protocol of trial” (Paragraph 1) and “when the accuracy of interpretation is not clarified through the procedure prescribed in Paragraph 1 above, the bench should designate another interpreter for appraisal” (Paragraph 2).

The same procedure may be used for objections against interpretation in a civil case. This warrants the need to record the interpretation performed to ensure the accuracy of the sign language interpretation. Therefore, when an interpreter interprets sign language, the entire interpretation performed should be recorded, and a record of such should be kept. When a party expresses an

objection against the accuracy of interpretation, the bench should have the same examination and interpretation repeated, or the interpreter should be given a recording of the examination and perform interpretation again.

### **G) Person Bearing the Interpretation Cost**

One possible issue is the question of who should pay for sign language interpretation performed on a trial date. Some argue that, since such cost is borne by the nation that is required to provide interpretation as a legitimate convenience under paragraphs 4 and 6 of Article 26 of the Act on the Prohibition of Discrimination Against Persons With Disabilities and such cost is not included in the litigation cost paid in advance and borne by the parties, an order of advance payment shall not be issued. Others maintain that such cost should, in principle, be included in the litigation cost to be borne by one of the parties, while utilizing the litigation aid system.

Article 16(2) of the Korean Sign Language Act stipulates that “the State and local governments shall provide sign language interpretation, if deemed necessary with respect to public events; judicial, administrative and other procedures; use of public facilities; public broadcasting; and other cases deemed necessary for public interest.” Article 26(4) of the Act on the Prohibition of Discrimination Against Persons With Disabilities specifies that “each public institution or its employee shall provide judicial and administrative procedures and services to the extent that persons with disabilities can use them on a substantially equal basis with persons without a disability, and shall provide reasonable accommodation for that purpose.” With this, Paragraph 8 of the same Article stipulates that “necessary matters in relation to the provisions of paragraphs 4 through 7 of Article 26 shall be prescribed by Presidential Decree.” In addition, Article 17(1) of the Enforcement Decree of the same Act provides that “in accordance with Article 26(8) of the Act, a public agency or its members shall provide

legitimate conveniences in cases where a person with a disability requests such conveniences to use a judicial or administrative procedure or service, or to participate therein. Such conveniences shall include assistants, braille materials, optical character reader, sign language interpretation, proxy reading, voice support system, and computers.”

Moreover, Article 8(2) of the same Act provides that “the State and local governments shall render technical, administrative and financial assistance so that persons with disabilities may be provided with reasonable accommodation.” When we consider the legislative intent of the Korean Sign Language Act and the Act on the Prohibition of Discrimination Against Persons With Disabilities and the provisions therein, interpretation constitutes a legitimate convenience provided to people with disabilities to protect their right to equal access to trial proceedings. Therefore, it seems that the legislator’s intention was to have the national treasury bear the interpretation cost. However, as there is currently no specific provision in that regard, the litigation aid system (refer to the utilization of the litigation aid system explained in Paragraph 2) or the national treasury payment system (refer to Articles 20 and 21 of the Regulation on Civil Procedure and the Established Rules on National Treasury Payment of Litigation Cost) would be the only available option.<sup>31)</sup>

Furthermore, if a litigant is a person with hearing impairment for whom sign language interpretation shall be provided, it would hinder or infringe his/her constitutional right to trial to impose on him/her the burden of advance payment of litigation cost.<sup>32)</sup> Where he/she is not the party

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31) On December 12, 2019, the Advisory Council on Judicial Administration resolved to establish the Supreme Court Rules on State Liability. Thus, it is necessary to examine the revision of the Rules of the Supreme Court in accordance therewith and the enactment and revision of the established rules concerned.

32) Refer to the Decision of the Disability Discrimination Remedy Committee under the National Human Rights Commission, 18JinJeong0384900 of September 19, 2008, which recommended the Chief



but the legal representative, attorney or participant in litigation, such as witness and expert, the following facts shall be considered on a case-by-case basis: Article 26 of the Act on the Prohibition of Discrimination Against Persons With Disabilities clearly stipulates the reasonable convenience and substantial equality; Article 17(1) of the Enforcement Decree also does not restrict these to a litigant; and Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) that has the same effect as domestic laws stipulates that States Parties shall provide convenience for direct and indirect participants including witness, etc. in all legal proceedings.

For reference, out of the 50 US states, the cost of a sign language interpreter in civil proceedings is paid for and borne by the relevant government (county, city, and state government) in 40 states (and these states have a separate provision that prohibits transferring the cost to a party with a disability or including it in the litigation cost). In addition, in Delaware, Columbia, Georgia, Maryland, Mississippi, Nevada, Vermont, Virginia, and Wyoming, each court may decide either to have a party bear the interpretation cost or to include it in the litigation cost at the court's discretion.

The Australian Civil Procedure Act (Section 73a(2)) provides that the federation should bear all court-related interpretation costs, including the interpretation performed when a party with a disability contacts his/her lawyer for court proceedings.

As for Germany and Japan, although the two countries have laws with regard to equal rights of people with disabilities, which is similar to the situation in South Korea, there is no specific provision on public responsibility for sign language interpretation. In actual civil practice, such cost is included in the litigation cost to be distributed under the general principle of cost distribution (to be borne by the defeated party).

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Justice of the Supreme Court establish a plan for providing legitimate convenience.

## H) Written Interpretation

Upon request from a party with a hearing impairment, the court may provide written interpretation ex officio (proviso to Article 143(1) of the Civil Procedure Act). Written interpretation is particularly useful for people with a hearing impairment that are capable of reading and writing. If a person with a hearing impairment is confirmed to have such capability, the court may need to provide written interpretation along with the previously provided sign language interpretation or hearing aid. Considering the limitations of sign language interpretation in relation to technical legal terms, providing written interpretation contributes to an enhancement in the efficiency and accuracy of interpretation.

The currently available method of written interpretation within the courtroom is to share stenographs through the courtroom screen. If the court decides to provide written interpretation, the court should designate a stenographer to perform written interpretation and prepare the required equipment to share the interpretation through the screen. Since most civil courtrooms install and provide a laptop in the party's seat, the courtroom screen controller may be configured so that the laptop screen can be viewed on the courtroom screen. In addition, if the party with a visual impairment wants to enter his/her own terminal, an employee in the computer room in the relevant court shall check whether the terminal could be connected with the courtroom screen. Otherwise, the party with visual impairment may write his/her statement on paper and have it projected on a courtroom screen with video presenters or delivered to the stenographer, and share the stenographic record through the courtroom screen.

As in sign language interpretation, simple and plain language should be used for written interpretation, and the procedures need to take place slowly. When both sign language interpretation and written interpretation are

provided, the court should allow some time for a party to communicate using sign language, confirm the written interpretation shown on the screen, and continue with the next statement. In cases where written interpretation is inaccurate, the presiding judge should point out the error and have the interpretation corrected. However, because a written interpretation record is different from a protocol, any grammatical errors in the statement should be maintained in the written interpretation.

The written interpretation records should be kept for confirmation, in case any party expresses an objection against the accuracy of interpretation.

## **E. Proceedings on Date for Pleading**

### **1) Commencement of Pleadings**

Where a participant in litigation is a person with disability, such as a person with a hearing impairment, etc. who has difficulty in communicating with spoken language and the presiding judge calls a case with only his/her voice, there is the risk that the person with a disability may not be able to understand the call, causing the judicial proceedings to suffer a setback or the participant of litigation to be disadvantaged unexpectedly. Thus, where there is a person with a disability who has difficulty in communicating with spoken language among the participants in a litigation, it is necessary to use various methods, such as character, sign language interpretation, etc. in a proper manner from when the case is called. Even where the disability is not known in advance, the presiding judge must be extremely careful, by examining the state, etc. of those present, to ensure that the person with a disability would not be disadvantaged by failing to hear the voice of the presiding judge. Pleadings shall not be conducted in a state where the judicial

assistance required for communication has not been sufficiently prepared. Rather, it would be desirable to proceed only up to the procedures necessary to identify the participants of litigation and provide judicial assistance, and conduct the pleadings after sufficiently preparing communication methods.

## 2) Non-appearance of a Party

According to Article 268 of the Civil Procedure Act, when both parties to a lawsuit have failed to appear on the date for pleading, or failed to plead even if they appeared, the presiding judge shall fix another date for pleading, and notify both parties thereof (Paragraph 1). When both parties have failed to appear on the new date for pleading under Paragraph 1 or on another date for pleading held subsequently, or failed to plead even if they appeared, if any of them fails to file a request for designation of another date within a month, such lawsuit shall be deemed to have been withdrawn (Paragraph 2). In addition, when both parties have failed to appear on the other date for pleading designated pursuant to a request for a designation of such date under Paragraph 2 or on the subsequent date for pleading, or failed to plead even if they appeared, such lawsuit shall be deemed to have been withdrawn (Paragraph 3). The purpose of these provisions is to ensure smooth proceedings by preventing any possible delay. The effects prescribed by Article 268 of the Civil Procedure Act occur regardless of the intent of the parties or the court.

However, in cases involving a party with severe disability, the observance of such principle may lead to unreasonable results. For example, when a plaintiff with a severe physical disability intended to appear at the set date using a wheelchair, but later called in to say that he/she cannot arrive at the courtroom on time because of an unavoidable delay, the court should check which date and time said party is able to appear at the courtroom,

rather than treat the party as absent.

In cases where the presiding judge has not yet called on the case and party, the court should check whether the other party has arrived, and change the date by asking the other party's opinion. Where the presiding judge determines that a party with a disability shall appear or plead, the presiding judge may change the date ex officio (refer to Article 165(1) of the Civil Procedure Act). If the party with a disability is confirmed to be absent after the hearing began by calling the case and the parties, and the other party is present, the court should ask for the other party's understanding and postpone the date for pleading. However, if the other party refuses to accept such postponement, the bench may proceed with pleading by deeming the matters stated in the written complaint as having been stated in accordance with Article 148(1) of the Civil Procedure Act, or conclude that both parties fail to appear at the trial date if the circumstances allow it.

In either case, the court should ask the party with a disability when and where he/she can appear for the next date for pleading, and fully consider the possibility of preparing another courtroom that is more easily accessible for a person with disability.

### **3) Type of Disabilities of the Party and Verification of Necessary Judicial Assistance**

The presiding judge shall provide an opportunity to have as much time as possible and plead orally so that a party with a disability would not have difficulty in perceiving the arguments of the other party, the progress of procedures and litigation relations.

#### **A) Physical Disability and Brain Lesion Disability**

##### **(1) Verification of Communication Capability and Communication**

## Method

People with physical disabilities or brain lesion disability caused by brain damage may have a speech impediment due to damage to linguistic capability. Thus, various communication assistance shall be provided in accordance therefor.

However, in cases where the speech impediment is not severe and it is possible to communicate with the person by paying extra attention or confirming the statement by asking again, communication with such person should proceed in accordance with the following guidelines:

- ① A person with a brain lesion disability may find it even more difficult to speak when he/she is under stress. Therefore, such person would be allowed to speak in a comforting and stable atmosphere.
- ② A person with a brain lesion disability needs some time to utter the first word of his/her speech. The bench should wait with patience. The bench should not ask questions that guess what the person intends to say, such as “Do you mean to say...?” before the person with a disability begins his/her speech.
- ③ When a statement made by a person with a speech impediment is not comprehensible, the bench should ask the person to repeat the statement. If the problem persists, the bench should suggest writing down the statement or relying on other ways to communicate.
- ④ If deemed necessary to clarify the statement made by a person with speech impediment, the bench should repeat the statement as it understood.
- ⑤ When a person with a brain lesion speaks, his/her face often cringes and the tone of his/her voice is usually high. Many people with brain lesion disability worry that such characteristics may give a bad impression or adversely affect the outcome of trial. Therefore, the

presiding judge, in particular, should be careful with his/her own facial expression and the tone of his/her voice.

- ⑥ Technical legal terms should be explained using plain language.
- ⑦ Many people with a brain lesion disability are limited only in their physical mobility, without any intellectual or mental disability. For this reason, the presiding judge should take care not to misunderstand the person with a disability in this regard.

## **(2) Accompaniment by a Person Related to the Person With Disabilities and Permission of Statement Assistant**

Where only close persons, such as family members, relatives, etc., can understand what the person with a physical disability or brain lesion disability means when they are speaking, the presiding judge shall permit a person related to the person with disabilities who will aid in communication or other acts to sit with the person with a disability or to be a statement assistant (paragraphs 1 and 3 of Article 143-2 of the Civil Procedure Act).<sup>33)</sup> However, the presiding judge shall inform the related person or statement assistant of the following in advance: if he or she exaggerates or distorts a statement of the person with a disability, the credibility of all statements of the person with a disability could be damaged; and that permission for him/her to act as a statement assistant may be revoked at any time (Article 143-2(2) of the Civil Procedure Act). It is required to explain to the party that behavior of the statement assistant may be revoked or corrected without delay (sentence 2 of paragraph 3 of Article 30-2 of the Regulation on Civil Proceedings).

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33) The following are classed as discriminatory acts under Subparagraphs 5 and 6 of paragraph 1 of Article 4 of the Act on the Prohibition of Discrimination Against Persons With Disabilities: Committing restriction, exclusion, segregation or denial against individuals representing or accompanying persons with disabilities for the purpose of helping such persons; and interfering with the rightful use of guide dogs or auxiliary equipment for persons with disabilities, etc.

### **(3) Assurance of Resting Time**

As a person with a physical disability or brain lesion disability may find it physically challenging to sit in a wheelchair for a long time, and may have to use the bathroom frequently, the presiding judge, before the beginning of the procedure, should ask the person with a disability how much resting time the person requires, and grant such resting time by adjourning the procedure after a certain amount of time, or by asking the person if he/she would like to rest for some time. In such cases, the presiding judge shall ensure the person with a disability is able to have resting time in a substantial way by leaving the courtroom if possible.

## **B) Visual Impairment**

### **(1) Information on Statement Method and Progress**

The presiding judge should allow for sufficient time for a party with visual impairment to understand the arguments from the other party, the progress of the procedures, and other litigation relations without difficulty, and give him/her sufficient opportunity to make an oral pleading.

Because a person with visual impairment can find it difficult to identify a speaker based only on his/her voice, the presiding judge, the other party, the attorney, the witness, or others who intend to speak during the proceedings should identify himself/herself before speaking, and the presiding judge should instruct the people in the courtroom to observe this procedure before beginning the proceedings. Because a person with visual impairment gains awareness of their surrounding situation by hearing sounds, such person may not be aware of what takes place within the courtroom if there is no sound associated with it. Therefore, when the presiding judge intends to read a record during the proceedings or deliberate on a motion with the other judges present, the presiding judge should audibly declare such intention by saying “I



will now review some records,” or “The bench will now discuss the matter,” so that the person with visual impairment may know what is taking place.

## **(2) Verification of Service of Documents Submitted by the Other Party**

It needs to be verified whether documents submitted by the other party were served and the details thereof could be confirmed. If they were not served in a format that allows their details to be confirmed, no statement shall be made and no evidence shall be examined on the relevant date.

## **(3) Consideration of Physical Characteristics**

A person with visual impairment may find it difficult to balance him/herself while standing. The presiding judge should allow the party, etc., with a visual impairment to remain seated throughout the proceedings and let the person know about the position of the seat.

## **C) Hearing Impairment**

Hearing impairment is a broad concept, which includes all of the following cases: where the person has completely lost their hearing; where the person has partially lost their hearing and is incapable of communicating using their voice; and where the person is capable of communicating with the help of a hearing aid or other auxiliary equipment. Therefore, in cases involving a person with hearing impairment, the bench should first check and confirm what would be the most convenient way for him/herto communicate. In such cases, the written interpretation may be provided upon request of the party or ex officio (refer to the proviso to Article 143(1) of the Civil Procedure Act; for the details of written interpretation, refer to pp. 39 and 93 and the below).

If the person has only partially lost his/her hearing, clearly articulating

each sentence or using a hearing aid may be a better way to facilitate communication than designating an interpreter. However, the court should be careful not to conclude that the use of a hearing aid completely remedies the disability; even when using a hearing aid, the court should take extra care to check from time to time whether the party is communicating properly.

When a person with a hearing impairment uses oral conversation, all speakers, including the presiding judge, should look at the face of the person with a disability and articulate each sentence clearly. Technical legal terms should be replaced with plain and simple expressions, and a slight delay should be allowed between each sentence to confirm that the person with a hearing impairment has understood it correctly. In addition, sentences should be repeated with patience when they are not communicated properly the first time.

When using sign language interpretation, the bench should frequently ensure that the person with a disability correctly understands the interpreted sentences and that the interpretation itself is performed accurately. Regardless of whether sign language or written interpretation is being used, the presiding judge should look at the person with a hearing impairment when speaking to help the person with a disability to understand what is being said through his/her lips and facial expressions. If the bench has designated an interpreter, the court needs to ensure that the previous interpreter continues to participate because he/she is familiar with the details of the case or the characteristics of the relevant person with hearing impairment.

Sufficient time should be secured for each hearing because communication with people with a hearing impairment requires speaking slowly, articulating each sentence, and frequently repeating and reconfirming each statement.

## **D) Mental Disabilities, Such as Developmental Disability, Intellectual Disability, etc.**

### **(1) Assurance of Sufficient Pleading Time and Resting Time**

The bench should be considerate of the possible pressure and stress felt by a person with mental disability, and allow for sufficient time for pleading. A person with a mental disability is apt to lose focus, and thus requires frequent rest. In addition, a person with a mental disability may find it difficult to speak at a fast pace; thus, others should wait with patience until the person is able to calm him/herself and begin speaking. For a person with a developmental disability, the pleading may take longer in the process of explaining in plain language or utilizing human resources for communication or understanding. Also, for a person with a mental disability, the pleading may become prolonged due to the deterioration of cognitive function, speech impairment, etc. caused by a lack of concentration, medication or, in some cases, long-term medication. Thus, the presiding judge shall secure sufficient time for pleading in light thereof.

### **(2) Use of Easy Terms**

The bench should be considerate of the intellect of the person with a mental disability, etc. (for a person with a developmental disability or a person with a mental disability who has been medicated for a long period of time, their cognitive capability may be deteriorated), avoid abstract legal terminology, use plain language, and repeat explanations in case the person does not comprehend what is being said. It is not a good practice to speak fast to save time, or to urge the person with a disability to speak faster.

When asked a vague or complicated question, a person with a developmental disability or a mental disability may make inaccurate statements, or unconditionally agree to what the presiding judge says, etc.,

due to a lack of understanding or a sense of panic. Notably, people with a developmental disability and some people with a mental disability are susceptible to suggestion and apt to provide affirmative responses. Thus, “yes/no” questions should be avoided unless absolutely necessary; open-ended questions should be used instead.

### **(3) Accompaniment by a Person Related to the Person With Disabilities and Permission of Statement Assistant**

Because many people with a mental disability experience difficulty communicating or expressing themselves, a person related to the person with disabilities should be allowed to accompany the person with a disability to assist him/her with communication, or to become a statement assistant (Article 143-2(1) of the Civil Procedure Act).

### **(4) Exercise of the Court’s Right to Request Elucidation or Right to Ask Questions**

In cases where a statement from a party with a mental disability is so defective, self-contradicting, or vague that it is impossible to understand its point, the court should actively exercise its right to request elucidation and its right to ask questions. In addition, when a party with a mental disability fails to provide sufficient proof for matters for which he/she bears the burden of proof, the court may urge the party to provide proof (paragraphs 1 and 4 of Article 136 of the Civil Procedure Act).

## **4) Preparation of Protocol**

When a person with a disability requests judicial assistance during a hearing, the purpose of such request and measures taken by the court should be included in the protocol.

When a statement assistant appears in the pleading, his/her name shall be specified in the protocol. Also, when a statement assistant mediates or explains, the purpose thereof shall be specified in the protocol (Article 30-2(5) of the Regulation on Civil Procedure). Where a sign language interpreter is designated or written interpretation is provided upon request, the name of the interpreter who appears (Subparagraph 4 of Article 153 of the Civil Procedure Act) and the fact that communication was made in the form of written interpretation, etc. shall be also specified in the protocol.

## **5) Stenographic Record, Voice Recording and Video Recording of Pleading**

A court may, if deemed necessary, tape-record the whole or part of pleadings, or order a stenographer to dictate them, and if any party requests to tape-record or stenograph them, it shall order to do so, unless there exists any special reason (Article 159(1) of the Civil Procedure Act). The recorded tapes and stenographic records shall be made a part of the protocol (Paragraph 2 of the same Article). A party or a third person vindicating the party's interests may file a written request for perusal, copying and delivery of recorded tapes and stenographic records, and an interested party may request perusal or for such records to be read to him/her (Articles 157 and 162 of the same Act).

A party with a disability is likely to need to use the procedures stated above to check the accuracy of communication, progress of the trial, etc., and the presiding judge shall be fully aware of such procedures.

Furthermore, the presiding judge needs to positively consider whether to record the pleading in the following cases: where written interpretation or sign language interpretation is provided for a person with a hearing impairment; or where it would be proper to video record the pleading. According to Article 37 of the Regulation on Civil Procedure, which

stipulates that the procedures for voice recording or stenographic record to the video-recording of pleadings should apply *mutatis mutandis*, the presiding judge may video record *ex officio* all or part of a pleading. Unlike the voice recording or stenographic record of pleading, a party is not explicitly assigned a legal right to request a video recording of a pleading. Where the party requests the video recording, the bench shall examine the same positively in accordance with the voice recording or stenographic record of pleading.

The detailed procedures for stenographic recording, voice recording and video recording of pleading shall be governed by Articles 33 through 37 of the Regulation on Civil Procedure (refer to Civil Procedure II Chapter 23 Section 6 (Recording, etc. of Pleading) of the Summary of Court Practices).

## 6) In the Case of an Attorney or Spectator With a Disability

### A) Attorney With a Disability

It might be questioned whether the court should provide judicial assistance to an attorney with a disability that is equivalent to that provided to parties with disabilities. The Constitution grants an attorney's right to assist with a trial, and there is no basis for concluding that the Act on the Prohibition of Discrimination Against Persons With Disabilities excludes attorneys with disabilities from its coverage. Therefore, an attorney with a disability should be granted judicial assistance equivalent to that provided to parties with disabilities. However, the presiding judge should determine the scope of assistance to be provided in each specific case by considering the types of judicial assistance requested by the attorney and the efforts or cost required for the provision of such.

### B) Spectator With a Disability

Another question is whether a spectator with a disability should benefit from judicial assistance.

First, Article 26 of the Act on the Prohibition of Discrimination Against Persons With Disabilities prohibits discrimination against persons with disabilities in relation to the provision of judicial and administrative procedures and services necessary to protect and guarantee their rights, including the right to life, body or property. This provision alone does not provide the legal basis required for judicial assistance for spectators with disabilities.

However, based on the principle of an open trial under the Constitution (Article 109(1)), the right to know of spectators with disabilities (Article 10), the general right to equality (Article 11(1)), and the obligations prescribed by Article 8(1) of the Act on the Prohibition of Discrimination Against Persons With Disabilities (the State and local governments shall be responsible for preventing any discrimination against persons with disabilities and persons related to persons with disabilities and providing remedies for infringement of rights of persons with disabilities discriminated against, and take affirmative measures to rectify discrimination described in this Act for the purpose of substantively eliminating discrimination against persons with disabilities) and Paragraph 2 of the same Article (the State and local governments shall render technical, administrative, and financial assistance so that persons with disabilities may be provided with reasonable accommodation), the court should actively consider providing conveniences for spectators with disabilities who have a rightful interest in the trial.

When an spectator with a disability requests convenience, therefore, the requester should prove his/her interest in the present trial. If we consider the principle of an open trial, the scope of “rightful interest” should be construed

somewhat broadly. However, as prescribed by Article 4(3) of the Act on the Prohibition of Discrimination Against Persons With Disabilities, the court is not required to provide the requested convenience when doing so might incur an excessive burden or undue hardship, or when such convenience cannot be provided due to the nature of particular duties. For example, in cases where such convenience delays the proceedings or hinders smooth implementation of the procedures, the parties' right to trial should not be damaged by the provision of such convenience.

## **F. Procedure of Evidence Examination**

### **1) Application for Evidence**

The usual procedure for requesting examination of evidence applies to cases in which a party or a witness is a person with a disability. However, the court should consider the following guidelines when a party or a witness is a person with a visual impairment or developmental disability (intellectual disability, autistic disorder), mental disability, etc.

#### **A) Visual Impairment**

In cases where a party is a person with a visual impairment, if the other party's request for examination of the witness has been accepted and the other party has submitted questions for the witness, a court official, etc. needs to also acquire an electronic file of such questions from the other party and provide it to the party with visual impairment in a form previously requested by the party.

In addition, in cases where a person with visual impairment is selected



as a witness, a court official, etc. should contact the witness viatelephone, etc. in addition to serving the witness summons, to explain the procedure of examination of a witness and verify whether the witness is able to appear at the court.

## **B) Mental Disabilities**

In cases where a party is a person with a mental disability, the court should provide a concise and plain explanation of the request for examination of evidence, method of examination, and relevant procedures so that the party may present his/her argument or defenses in a timely manner. In addition, the court may, if it fails to obtain a conviction by the evidence offered by parties, or otherwise deems it necessary, conduct ex officio an examination of evidence (Article 292 of the Civil Procedure Act).

## **2) Examination of a Witness**

### **A) Service of the Guide on Judicial Assistance (Convenience Provision) for People With Disabilities**

Where the disability of a witness was not revealed at the time of the request for the witness but became known thereafter, the court shall have a court official serve a summons together with the Guide on Judicial Assistance (Convenience Provision), so that the witness will be able to receive the necessary judicial assistance. Where a witness requests judicial assistance for people with disabilities, the assistance procedures shall proceed in accordance with the judicial assistance for party with disabilities, and the date for examination shall be designated or changed based on the period during which the judicial assistance is prepared.

### **B) Person Related to the Witness With Disabilities**

This section will discuss cases in which a witness with a disability is accompanied by a person who is related to him/her for assistance with communication or activity, and requests the court's permission to sit with the related person.

As previously mentioned, excluding a person related to the person with a disability without justifiable grounds constitutes a discriminatory act prohibited under the Act on the Prohibition of Discrimination Against Persons With Disabilities (Article 4(1)5); therefore, a person related to the person with a disability should be allowed to sit with the witness in principle. However, the court should advise the accompanying person against engaging in any acts that might affect the witness' statement or distorting any questions or answers, while providing appropriate instructions during examination. If a situation occurs that calls the fairness of the person related to the person with a disability into question, or the other party or his/her representative expresses an objection against the person related to the person with a disability and the court finds such objection reasonable, the court should not allow the person to sit with the witness further, and exclude him/her from the examination.

### **C) Cautionary Notes**

#### **(1) Physical Disability**

Because people with physical disabilities may find it physically challenging to sit in a wheelchair for a long time, the bench should ask the person with a disability how much resting time he/she requires, and grant such resting time by adjourning the procedure after a certain amount of time.

#### **(2) Visual Impairment**

When a person with visual impairment appears at the court as a witness

to make a statement, the court official should read the written oath aloud and put the witness' name and seal or sign thereto on the witness' behalf (Article 321(3) of the Civil Procedure Act).

Furthermore, in cases involving a party or an attorney with a visual impairment, the presiding judge should explain the position of the witness to the party with visual impairment. When the other party presents an evidentiary document or a drawing to the witness during examination, the presiding judge should specify the content of such document or drawing for the party with a visual impairment. Also, the party or attorney with a visual impairment will prepare a trial through recorded files after completing witness examination. Thus, the preparation of a protocol of the examination of a witness that includes the recorded files shall not be delayed.

### **(3) Hearing Impairment or Speech Impediment**

In cases where a witness is a person with hearing impairment or speech impediment caused by brain lesion disability, etc., if a party who applied for examination of a witness requests judicial assistance for the witness based on his/her identified disability, the court should indicate the gist of such request and measures taken in the protocol, and provide the requested assistance according to the procedures for providing judicial assistance to parties with disabilities.

When providing sign language interpretation for a witness, ensuring the fairness of the interpreter may be an even more critical issue compared to when a party or a spectator is a person with a disability. Whether an accompanying interpreter or a designated interpreter is used should be determined by the presiding judge after hearing from both sides. In principle, a designated interpreter should be used, but an accompanying interpreter may be appointed if neither party objects and the interpreter is found to be neutral

and sufficiently skilled (refer to page 83 and the below).

The court should designate a sign language interpreter from among the interpreters included in the court's interpreter list. If the number of registered interpreters is small, it might be helpful to check the schedule of the registered interpreters in advance and set the date for pleading accordingly. Before the date for pleading, a designated interpreter needs to be provided with a guide including cautionary notes for sign language interpreters, and a copy or summary of the complaint and the defense.

A person with hearing impairment who can read may take the oath using sign language while looking at the written oath, which is to be interpreted by the sign language interpreter. If the person with a hearing impairment is illiterate, the court may use the same procedure, except that the court will inform the person that he/she may take the oath by repeating after the sign language interpreter interpreting the written oath using sign language.

#### **(4) Mental Disabilities**

When examining a witness with a mental disability, more time should be allowed for the examination, along with sufficient time to rest to recover from loss of attention, and the person should be allowed additional time to drink water or take medication. Also, for individuals with a mental disability that is accompanied by a deterioration of cognitive capability, such as a person with a developmental disability, or a person with a mental disability who has been taking medication for a long period of time, the court should avoid using technical terms or vague expressions, and instead, should rely on plain and simple terms as much as possible. (For more detailed guidelines on questioning people with mental disabilities in criminal proceedings, refer to the sections on criminal proceedings, on page 178 and in the text below.)

- ① Use words that clearly convey the intended meaning, speak slowly, and use short sentences.
- ② Before going into the main questions for the examination, first verify the level of mental development. This can be done, for example, by asking questions to assess the person's understanding of numbers, time, seasons, causality, and sequence to adjust the examination accordingly.
- ③ When providing complicated information, divide such information into smaller parts to convey the meaning.
- ④ If possible, use figures or gestures to convey the intended meaning in a way that is easily comprehensible.
- ⑤ Use proper nouns rather than pronouns or terms used in the courtroom (for example, refer to each person by his/her name, rather than using terms such as plaintiff, defendant, and witness).
- ⑥ Ask open-ended questions first to elicit voluntary statements from the witness, and later draw out more specific statements by asking questions based on the initial statement. Avoid "yes/no" questions or leading questions.
- ⑦ Avoid asking multiple-choice questions as much as possible. If this type of question is necessary, it should be mixed with open-ended questions (for example, asking "whether the witness witnessed the incident in the morning, in the evening, or at another time of the day").
- ⑧ If necessary, convey information multiple times using different words or means of communication, without changing the words that the person with a disability is already using.

Because a party who applied for examination of a witness should submit a document listing questions to ask the witness before the due date set by the court, the presiding judge may order the party to revise the questions if they are not sufficiently specific, contain leading questions, or are otherwise inappropriate (refer to Article 80(3) of the Regulation on Civil Procedure).

Statements from a person with a mental disability may vary from procedure to procedure, or depending on the intention of the person asking

questions. Different statements may be provided for the same facts depending on the time, the atmosphere, and the type of the question. When asked a leading question, a person with a mental disability is apt to be led by such a question. These characteristics may severely distort the statements provided by a person with a mental disability during examination of a witness. Such distortion can be minimized by understanding the above characteristics of statements from a person with a mental disability. Therefore, participants in the proceedings need to share information on the disability, its grade, nonverbal expressions, and the way in which the person answers or speaks. In some cases, it may be helpful to have an expert explain such characteristics. By understanding the characteristics of the individual person with a mental disability who participates as a party or witness before proceeding with examination of the parties or witness, the provision of a misguided impression because of such characteristics of a person with mental disability can be prevented. To this end, the court may have a designated professional examiner submit a paper stating his or her explanation or opinion, provide an explanation or opinion during the litigation procedures, or if necessary, have the examiner question the party or witness with a mental disability (refer to Article 164-2 of the Civil Procedure Act).

Upon receipt of a motion from a person with a developmental disability him or herself, prosecutor, guardian, or the head of the relevant support center for persons with developmental disabilities when a court intends to examine the person with a developmental disability as a witness, it shall allow him or her to be accompanied by a person who has a reliable relationship therewith, except in unavoidable circumstances, such as where the judicial proceeding is likely to be substantially hindered (Article 12(3) of the Act on Persons With Developmental Disabilities).

### 3) Video or Audio Material Submitted as Evidence

#### A) Application for Examination of Evidence

Article 121(3) of the Regulation on Civil Procedure, regarding examination of video or audio materials submitted as evidence, provides that “a party who applies for examination of record tapes, etc., submitted as evidence shall, upon request from the other party or an order from the court, submit a transcript of such record tapes, etc., and a paper describing the contents thereof.” Therefore, when video or audio materials have been submitted as evidence (record tape, magnetic disc, or optical disc), if the other party is a person with a hearing impairment or speech impediment, the presiding judge should require the applicant to submit a transcript of such materials and a paper describing the contents thereof ex officio, and have them served to the party with a disability so that the latter may review the contents before examination.

In cases where a party is a person with a visual impairment and the other party applies for examination of video materials submitted as evidence, the presiding judge may require the applicant to submit a document describing the contents of the materials in accordance with Article 121(3) of said Regulation. The presiding judge should require the applicant to describe the specifics of each scene contained in the materials. When describing the contents of a photograph or a video to a person with a visual impairment, the description should not include features that can be inferred from the visual images, but should focus on the images themselves. Such description should be given in a way that is similar to painting a picture with words; for example, by saying that a person was at the top left of the image and then walked down to the right and went out of the frame, or a person is standing at the bottom left of the image and another person is looking at the person from the center of the image. As mentioned previously, the document containing

such description should be submitted in a format that can be understood by the person with visual impairment, or the court should convert the document into such format before serving it.

## **B) Examination of Evidence**

Audio/video materials shall, in principle, be examined by playing the materials (Article 121(2) of the Regulation on Civil Procedure). Electronic documents can be listened to or watched (Article 13(1)2 of the Act on the Use, etc. of Electronic Documents in Civil Litigations, etc.). In such cases, a party with a hearing impairment should be provided interpretation service, and a party with a visual impairment should be provided an explanation of the materials by the attorney or an assistant, and other types of judicial assistance should be provided so that a party with a disability may participate in the examination process in a meaningful way.



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## 4 Pronouncement of Judgment

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Although the bench may pronounce its judgment without either party present on the date of pronouncement, in cases where a party is a person with a disability and he/she has expressed his/her intention to appear at the court on the date of pronouncement in advance, the court should provide judicial assistance, have the parties approach the judge's stand before pronouncing the judgment, and indicate their presence in the protocol (a good practice would be to ask the parties whether they will appear on the date of pronouncement at the end of the pleading procedure to determinewhether the court should prepare judicial assistance).

In cases involving a party with a mental disability, the decision should be written in a comprehensible and concise manner, and the court should explain the details of the judgment, the period, and the procedure of appeal to the parties present on the date of pronouncement. In addition, the legal representative, if there is one, should be served with a written judgment so that he/she may decide whether to proceed with an appeal (refer to Article 179 of the Civil Procedure Act).

A court official should provide a party with visual impairment with the paper documents as well as the material converted into the format requested by the party. The written judgment form currently used includes 2D bar codes for optical character reader programs. Since an original of the written judgment is provided in the format of a text PDF file as an electronic document, it could be converted into voice with the screen reader.

The judicial handling may become an Issue, in the event that a person with visual impairment fails to comply with invariable periods, such as appeal period, etc., because he/she could not verify a written judgment

due to non-delivery of the written judgment converted into a format for which he/she applies other than a document or an error in 2D barcode for voice conversion printed on the written judgment. When serving a written document, the following shall be determined on a case-by-case basis: whether the object to be served has been explained accurately; whether a person with visual impairment appoints an attorney; when a person with visual impairment applies for the conversion and provision of litigation documents, such as judgment, etc.; and whether a person with visual impairment could not observe an invariable period due to any cause not attributable to himself, such as an error in the 2D barcode for voice conversion printed on the judgment, etc. Where it is evident that, in addition to visual impairment, a delay in providing a converted judgment by the court, an error in the 2D barcode, etc. provide an important cause to fail to comply with an appeal period, an appeal for completing the litigation may be raised within 2 weeks from the date the judgment could be verified by the delivery of converted materials, correction of barcode, etc., even if the appeal period therefor has elapsed (Article 173 of the Civil Procedure Act).

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## 5 **Compromise or Conciliation Procedures**

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Compromise or conciliation procedures involving a party with a disability proceed in a similar manner to other procedures, including pleading. The statement assistant system may be utilized even in compromise or conciliation procedures.

The date and location for conciliation or compromise should be set in consideration of the time required for preparation of judicial assistance for people with disabilities.

In such cases, the person with a disability needs to be informed of the significance and stages of the conciliation or compromise procedure before the date is set. In particular, the fact that the result of conciliation or compromise has the same effect as a final and conclusive court decision needs to be considered. Therefore, when the case involves a party with a hearing impairment, the bench needs to explain the significance of the procedure in plain language so that the interpreter can accurately interpret the bench's explanation, or must consult with the interpreter to determine the appropriate method of interpretation. If the party is a person with a mental disability, the bench needs to directly ask the party if he/she is genuinely willing to proceed with the conciliation or compromise to ensure the conciliation or compromise is not continued against the party's will.

Parties tend to speak more freely during compromise or conciliation, which may lead to inaccurate interpretation. During compromise or conciliation, therefore, the court needs to proceed slowly using plain language, allow sufficient time for interpretation after a party makes his/her statement, check if the statement has been communicated properly, and proceed with the other party's statement.

Once a compromise or conciliation is reached, the presiding judge or the head of the conciliation must explain the result of mediation using plain language in a way that the parties can easily understand, and confirm that they properly understood the meaning of the compromise or conciliation.



# Judicial Assistance in Criminal Proceedings

- \_\_\_ 1. Criminal Proceedings and People With Disabilities
- \_\_\_ 2. Before Indictment
- \_\_\_ 3. After Indictment and Before the First Criminal Trial Date
- \_\_\_ 4. Hearing on Trial Date
- \_\_\_ 5. Participatory Trial
- \_\_\_ 6. Pronouncement of Judgment





### III

## Judicial Assistance in Criminal Proceedings

# 1 Criminal Proceedings and People With Disabilities

## A. Criminal Litigation Capacity of People With Disabilities

### 1) Defendants With Disabilities

#### A) Litigation Capacity

Litigation capacity in criminal proceedings is the mental capacity of a defendant to understand his/her status within the case and his/her interests therein, and conduct his/her defenses accordingly. Article 26 of the Criminal Procedure Act provides that “in a case involving a criminal offense to which Articles 9 through 11 of the Criminal Act do not apply and the criminal defendant or the criminal suspect is devoid of mental capacity, he/she shall be represented by his/her legal representative in regard of acts of litigation.” In addition, Article 306(1) provides that “if the criminal defendant is unable to discern right from wrong or make a decision, the court shall, by its ruling, suspend the trial during the continuance of such state, after hearing the opinions of the prosecutor and his/her defense counsel.” These provisions are



based on the concept of litigation capacity explained above.

A question may arise as to the litigation capacity of defendants with a mental disability. A person with a brain lesion disability may not be so different from a person without a disability in terms of intellect. Thus, the court shall determine the litigation capacity of a person with a brain lesion disability based on whether his/her physical capacity is restricted or whether even his cognitive behavioral capacity, such as intellect, thinking ability, etc., is restricted. Where litigation capacity is at issue, the litigation capacity of the defendant should be determined based on his/her mental capacity to understand his/her status within the case and his/her interests therein, and conduct his/her defenses accordingly. In a case in which the defendant's litigation capacity was at issue, the Supreme Court held that "even though the defendant has issues with attention or judgment, his/her intellect is above the normal level and his/her consciousness is clear, without any disability of perception or memory. In addition, the defendant understands that he is subject to medical treatment and custody if he waives appeal. Therefore, the defendant had litigation capacity at the time of his/her waiver, and such waiver is valid." (Supreme Court Decision 92Gamdo10 of April 14, 1992)

## **B) Effect of Defects in Litigation Capacity**

A procedural act conducted by a natural person without litigation capacity is invalid. In this sense, if the criminal defendant is unable to discern right from wrong or make a decision due to physical or mental disabilities, the court shall, by its ruling, suspend the trial during the continuance of such state, after hearing the opinions of the prosecutor and his/her defense counsel (Article 306(1) of the Criminal Procedure Act).

However, where it is obvious that the defendant will be pronounced innocent, acquitted, exempted from punishment, or rejected from the public

prosecution, the decision may be made without the criminal defendant appearance in the court, even though the criminal defendant has no litigation capacity (Article 306(4) of the Criminal Procedure Act). Moreover, in a case involving a criminal offense to which Articles 9 through 11 of the Criminal Act do not apply and the criminal defendant or the criminal suspect is devoid of mental capacity, he/she shall be represented by his/her legal representative in regard of acts of litigation (Article 26 of the Criminal Procedure Act).

## **2) Victims With Disabilities**

### **A) Litigation Capacity**

The principle that a person with mental capacity also has litigation capacity applies to cases in which a victim or a third party conducts procedural acts. The Supreme Court has also held that “a person who seeks to file a complaint should have litigation capacity. Litigation capacity can be recognized if the person has the mental capacity to understand the harm inflicted and the interests regarding social activities pertaining to such complaint. Therefore, a person lacking the capacity to act under the Civil Act may be deemed to have litigation capacity if the person has the mental capacity above.” (Supreme Court Decision 98Do 2074 of February 9, 1999). The same principle applies to offenses that cannot be punished against the victim’s intent to prosecute, where the victim declares his/her intent not to prosecute the case or withdraws his intent to prosecute it (Supreme Court Decision (en banc) 2009Do6058 of November 19, 2009).

In such cases, however, the court needs to carefully investigate and determine whether the victim has the mental capacity to understand the significance of the crime, the circumstances around the harm, and the meaning, details, and effects of the expression of will for or against punishment, or the withdrawal thereof, to see if the victim has the mental

capacity in the sense explained above, or if his/her expression is genuine.

## **B) Effect of Defects in Litigation Capacity**

Complaint refers to a juristic act seeking indictment of the perpetrator. A complaint requires the mental capacity to understand the significance of the harm inflicted and the interests pertaining to the complaint. A complaint filed by a victim lacking such capacity is invalid. In cases where a victim who had no mental capacity to file a complaint later recovered such capacity, the period of complaint should commence at the time of such recovery (refer to Supreme Court Decision 2007Do4962 of October 11, 2007).

When a victim declares his/her intention not to prosecute the case or withdraws his intention to prosecute it in relation to an offense that cannot be punished where the victim is not seeking prosecution, such statement or withdrawal is invalid if the person lacks the litigation capacity.

## **B. Litigation Participant of People With Disabilities**

### **1) Defendants With Disabilities**

#### **A) Legal Representatives, etc. of the Defendant**

In cases where a defendant is a minor or is subject to adjudication to commence adult or limited guardianship, the defendant's legal representative may exercise the following rights. The same rights are granted to the spouse, a lineal relative, or a sibling in some cases.

Right to Appoint Defense Counsel (Article 30(2) of the Criminal Procedure Act)	The legal representative, the spouse, a lineal relative, or a sibling of a criminal defendant may independently appoint a defense counsel.
Right to Request Inspection or Copying of Documents or Evidential Materials (Article 35(2) of the Criminal Procedure Act)	The legal representative of a criminal defendant, a special agent under Article 28, an assistant under Article 29, or the spouse, a lineal relative, or a sibling of a criminal defendant, who files a letter of attorney and a document certifying his/her status, shall have a right to inspect or make a copy of any related document or evidential material for his/her case pending in a court.
Right to File a Motion for Release on Bail (Article 94 of the Criminal Procedure Act)	A criminal defendant's defense counsel, legal representative, spouse, lineal relative, sibling, family member, cohabitant, or employer may file a motion for release of the defendant on bail with the competent court.
Right to Request to Sit With a Person in a Reliable Relationship (Article 276-2 of the Criminal Procedure Act)	When the presiding judge or a judge examines a criminal he/she may allow a person who has a reliable relationship with the criminal defendant to sit in company with the criminal defendant, ex officio or upon request of the criminal defendant, his/her legal representative, or the prosecutor, if the criminal defendant lacks the ability to discern right from wrong or make and communicate a decision due to a physical disability or mental disorder; or if it is necessary for facilitating the criminal defendant's psychological stability and smooth communications in light of his/her age, gender, nationality, or any other factor.
Right to Lodge an Appeal (Articles 340 and 341 of the Criminal Procedure Act)	The legal representative of a criminal defendant may lodge an appeal on behalf of the criminal defendant. The spouse, a lineal relative, or a sibling of a criminal defendant may lodge an appeal on behalf of the criminal defendant, insofar as such action is not taken against the clearly expressed intention of the criminal defendant.
Right to Consent to Waiver or Withdrawal of Appeal (Article 350 of the Criminal Procedure Act)	A criminal defendant who has a legal representative shall obtain the consent of his/her legal representative before waiving or withdrawing an appeal: Provided, that this shall not apply when such consent cannot be obtained on account of death of his/her legal representative or for some other reason.
Withdrawal of Appeal (Article 351 of the Criminal Procedure Act)	The legal representative of the criminal defendant or those referred to in Article 341 may withdraw an appeal in accordance with the consent of the criminal defendant.

## B) Assistant

A legal representative or the spouse, a lineal relative, or a sibling should become an “assistant” by filing a report to conduct procedural acts on his/her own beyond the rights or status described above.

Where no person capable of acting as an assistant exists or where a person is unable to act as an assistant due to disability, etc., a person who has a reliable relationship with the criminal defendant may act as his/her assistant.

Additionally, if a person with a developmental disability becomes a party to a judicial proceeding, his or her guardian, a staff member of the central or a local support center for persons with developmental disabilities, or a person who has a reliable relationship with the person with a developmental disability may serve as an assistant thereto in trials before the court, with permission from the court. An assistant may independently perform acts of litigation which do not go against the express will of the criminal defendant or the criminal suspect: provided, however, that the foregoing shall not apply where it is specified otherwise in Acts (paragraphs 1, 2, and 4 of Article 29 of the Civil Procedure Act, Article 12(2) of the Act on Persons With Developmental Disabilities).

A person who intends to act as an assistant should file a report of his/her intention with the competent court at each level (Paragraph 2 of the same Article); such report may be given orally. A report filed by an assistant shall be given together with a paper proving the family relationship between the person who intends to be an assistant and the accused or the suspect (Article 11(1) of the Regulation on Criminal Procedure). Declarations filed by the assistant prior to the institution of public prosecution shall remain effective until the end of the first instance (Paragraph 2 of the same Article).

### **C) Public Defender**

According to Article 33 of the Criminal Procedure Act, the court should appoint a defense counsel ex officio when the defendant is a person with hearing impairment or speech impediment, or the defendant is suspected of having a mental disorder (Paragraphs 1, 4, and 5 of the same Article), and when the court deems it necessary to protect the rights considering the age, intelligence, level of education, etc. of the defendant, it shall appoint a defense counsel within the scope that it does not conflict with the explicit

intention of the defendant (Paragraph 3 of the same Article).

In cases where the defendant seems to lack the capacity to understand his/her status or interests within the proceedings or to conduct a defense, but still has no private defense counsel appointed, the court should have a public defender appointed in accordance with the above provision.

## 2) Victims With Disabilities

### A) Legal Representative of the Victim

In cases where a defendant is a minor or is subject to adjudication to commence adult or limited guardianship, the defendant’s legal representative may exercise the following rights. In addition, as specified in the table below, the same rights are granted to the spouse, a lineal relative, or a sibling in some cases.

Right of Complaint (Articles 225 and 226 of the Criminal Procedure Act)		A legal representative of a victim may file a criminal complaint independently. On the death of the victim, his/her spouse or any of his/her lineal relatives or siblings may file a criminal complaint, insofar as it is not against the express intention of the injured party. Where the legal representative of a victim or a relative of the said legal representative is the criminal suspect, a relative of the victim may file a criminal complaint independently.
Right to Make Statements (Article 294-2 (1) of the Criminal Procedure Act)		Upon receipt of a petition from a victim of a crime or his/her legal representative (including his/her spouse, lineal relative, and sibling, if the victim is dead; hereafter referred to as “victim”), the court shall admit such victim as witness for examination, unless there is no necessity of restatement or the procedure of trial may be delayed markedly.
Right to Request to Sit With a Person in a Reliable Relationship	Article 163-2 (1) of the Criminal Procedure Act	When a court has a victim of a crime sit in the witness box for examination, the court may, if deemed that the victim is likely to feel severe uneasiness or tension in light of the age of the witness, his/her physical or mental state, or any other circumstances, allow a person who has a reliable relationship with the victim to sit in company with the victim, ex officio or upon a motion of the victim, his/her legal representative, or the prosecutor.
	Article 59-8 (2) of the Act on Welfare of Persons With Disabilities	In cases of questioning an abuse victim with a disability as a witness, a court may, when requested by the person in question or by a prosecutor, allow the witness to be accompanied by a person whom he or she trusts.

	<p><b>Article 12 (3) of the Act on Persons With Developmental Disabilities</b></p>	<p>Upon receipt of a motion from a person with a developmental disability him or herself, prosecutor, guardian, or the head of the relevant support center for persons with developmental disabilities when a court intends to examine the person with a developmental disability as a witness, it shall allow him or her to be accompanied by a person who has a reliable relationship therewith, except in unavoidable circumstances, such as where the judicial proceeding is likely to be substantially hindered.</p>
<p><b>Victim's Inspection and Copying of Litigation Record) (Article 294-4 (1) of the Criminal Procedure Act)</b></p>	<p>A victim of a case pending in a court (including his/her spouse, lineal relative, and sibling, if the victim is dead or suffers from severe mental disorder), the legal representative of the victim, or the spouse, lineal relative, sibling, or attorney-at-law with power of attorney granted by the victim or his/her legal representative, may file an application for inspection or copying of the records of trial with the presiding judge.</p>	

## B) Assistant

Where an abused person with a disability is a victim, his/her legal representative, lineal relatives, siblings, counselors affiliated with advocacy agencies for persons with disabilities, or attorneys-at-law may serve as assistants in the trial over the alleged abuse of the person with a disability; provided, however, that those who are not attorneys-at-law shall obtain permission therefor from a court (Article 59-8(1) of the Act on Welfare of Persons With Disabilities). If a person with a developmental disability becomes a party to a judicial proceeding, his or her guardian, a staff member of the support center for persons with developmental disabilities, or a person who has a reliable relationship with the person with a developmental disability may serve as an assistant thereto in trials of the court, with permission from the court (Article 12(2) of the Act on Persons With Developmental Disabilities). The above provisions can also be applied to cases where a person with a developmental disability is a victim.

## C) Victim's Attorney

The Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes, wholly amended by Act No. 11556 on December 18, 2012, expanded

the scope of victims' access to a court-appointed lawyer, previously appointed only to child or juvenile victims of crimes of sexual violence, to victims of crimes of sexual violence in general. The victim of a sexual crime and his/her legal representative may appoint counsel to defend them against any damage that they may suffer in criminal proceedings and to provide them with legal assistance (Article 27(1)). The counsel may participate in the investigation of the victim or the legal representative by a public prosecutor or a police officer to state his/her views (Paragraph 2 of the same Article), and may appear before the court to state his/her views at any stage of the examination of the suspect before detention, procedures for preserving evidence, preparatory hearing date, and trial proceedings (Paragraph 3 of the same Article). The counsel also may inspect or copy any related document or evidence for his/her case in which evidence is preserved or which is pending in the court (Paragraph 4 of the same Article), as well as have the comprehensive power to act on behalf of the victim, etc. in all procedural acts for which representation is permissible in criminal proceedings (Paragraph 5 of the same Article). In addition, if the victims retains no counsel, the public prosecutor may appoint a public defender to protect the victim's rights and interests in criminal proceedings (Paragraph 6 of the same Article).

Therefore, a victim of a crime of sexual violence with a disability can appoint a defense counsel to protect the victim against possible harms caused by criminal proceedings and ensure legal assistance. In addition, the appointed counsel can conduct procedural acts as a representative of the victim. In cases where the public prosecutor did not appoint a public defender for the victim, but the court deems such appointment necessary to protect the rights and interests of the victim with a disability, the presiding judge should urge the public prosecutor to appoint a public defender.

Where a victim of a crime of sexual violence, a sexual offense against



children or youth or a crime of child abuse and his/her legal representative appoints an attorney or a public prosecutor appoints a public defender, the court shall notify the attorney or the public defender of the trial date in writing or by phone, email, facsimile, cellular phone text message, or in another appropriate manner, when a document that could evidence the appointment, etc. of the victim's attorney is submitted (Article 4 of the Regulation on Hearing, Trial, and Victim Protection for Sexual Crime Cases). In some cases, notwithstanding the provision stated above, the date is not reported to the victim's attorney. In cases where a person with disability is a victim of a crime of sexual violence, it would be desirable to notify the victim's attorney of the trial date in order to guarantee the victim's right to present his/her opinion in a substantial way.

Moreover, Article 10 of the Regulation on Hearing, Trial, and Victim Protection for Sexual Crime Cases provides that “a presiding judge may request a public prosecutor to cancel designation of a public defender appointed under Article 27(6) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes if he/she does not carry out his/her duties with due diligence or is deemed as inappropriate to continue to be involved in the trial procedures, for the purpose of protecting the victim.” Furthermore, Article 16(1)8 of the Regulation on Designation of Public Defender by Prosecutor, etc. includes “when a presiding judge requested the cancellation of public defender designation for the purpose of protecting the victim” on the list of grounds for mandatory cancellation of designation. The court should actively supervise the performance and attitude of public defenders for victims with disabilities, and request the cancellation of public defender designation if he/she shows inappropriate performance or attitude.

### 3) Other Related Persons

#### A) Person Related to the People With Disabilities

Article 4(1)5 of the Act on the Prohibition of Discrimination Against Persons With Disabilities defines that committing restriction, exclusion, segregation, or denial without justifiable grounds against individuals representing or accompanying persons with disabilities for the purpose of helping such persons, as a form of discriminatory acts. This also applies to criminal proceedings; when a person related to the person with disabilities performs an act to help the person with disabilities, such as requesting to sit with the defendant with disabilities or victim with disabilities, the court should allow it. In particular, people related to the person with disabilities who assist with communication should not be compelled, interfered with, or treated unfairly without justifiable grounds in accordance with Article 20(2) of the Act on the Prohibition of Discrimination Against Persons With Disabilities. When a defendant or a witness with a disability is accompanied by a related person for assistance with sign language interpretation, braille interpretation, braille correction, reading, proxy writing, or guidance, the court should allow such person to provide the required assistance to the person with a disability. Notably, in terms of the scope of participation in pleadings by an assistant, interpretation assistant, etc. of people with disabilities, the application of Article 20(2) of the Act on the Prohibition of Discrimination Against Persons With Disabilities could be at issue. Unless a person related to the person with disabilities does not perform an essential duty of a person who participates in litigation, it shall not be prohibited for the person related to the person with a disability to participate in the litigation. Also, where a person with a disability uses judicial proceedings and services or demands to participate therein, the court shall provide necessary legitimate convenience, such as staff, etc. (Article 17(1) of the Act

on the Prohibition of Discrimination Against Persons With Disabilities).

With regard to the possible scope of participation in litigation by a person related to a person with disabilities, the following could be at issue: (1) Where a witness with visual impairment requests an accompanying person to verify a protocol, whether or not to permit such request; (2) Where a person with hearing impairment argues that the interpretation of a sign language interpreter designated by the court is inaccurate and requests the court to permit a person accompanying him/her to provide sign language interpretation; or (3) Where an attorney of a person with hearing or visual impairment requests the court to permit his/her accompanying office staff, etc. to read witness examination matters, whether or not to permit such request. It seems that whether or not such requests are permitted shall be decided based on whether a matter requested submits an essential duty that shall be performed by a litigation participant. Thus, (1) since a witness shall verify a protocol to determine its authentication, the authentication rendered by an accompanying person is not acknowledged. However, it is possible to read a protocol or provide braille or electronic file. Additionally, (2) a sign language interpreter designated by the court shall, in principle, be used. However, an accompanying person may interpret, in cases where the accuracy of interpretation is guaranteed and the distortion by an interpreter is not at issue. Also, it is possible to help witness examination by reading matters to be examined which are prepared in advance by an attorney with visual or hearing impairment. However, it may not be permitted to additionally ask regarding a matter not included in the matters to be examined or conduct cross-examination.

## **B) Person in a Reliable Relationship**

The presiding judge or a judge may, when he examines a defendant,

allow a person who has a reliable relationship with the defendant to accompany the defendant, ex officio or upon receiving a request from the defendant or his/her legal representative or the public prosecutor, if the criminal defendant lacks the ability to discern right from wrong or make and communicate a decision due to a physical disability or mental disorder (Article 276-2(1)1 of the Criminal Procedure Act). In addition, if a victim of a crime is less than 13 years of age, or is incompetent to discern right from wrong or make legal decisions because of his/her physical or mental disability, the court should allow a person who has a reliable relation with the victim to accompany the victim, unless such company is likely to cause a problem in the proceedings or there is any inevitable reason otherwise (Article 163-2(2) of the Criminal Procedure Act). A person who accompanies the victim as per the above provision should not interfere with the examination by the court, examination of a party to the case, or testimony of a witness, nor commit any act that is likely to have an undue influence on the contents of testimony of the witness (Paragraph 3 of the same Article). Regarding this, the Regulation on Criminal Procedure defines a person in a reliable relationship who may accompany a victim as the spouse, lineal relatives, siblings, family member, cohabitant, employer, defense counsel (for victim), and other people who may help with psychological stability and smooth communications of the victim. Moreover, the Regulation also provides that if a person accompanying the victim unfairly impedes the progress of judgment, the presiding judge may suspend the accompaniment (Articles 84-3 and 126-2). Furthermore, where a court examines the victim of a crime provided for in any of Articles 3 through 8, 10 and 15 (excluding an attempt to commit a crime under Article 9), as a witness, it shall, upon request by the public prosecutor or the victim of his/her legal representative, allow the appearance of a person in a relationship of trust with the victim, except where

his/her appearance may pose difficulties to the trial or otherwise there exist any unavoidable circumstances (Article 34(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes). However, the court shall not allow the appearance of a person in a relationship of trust with the victim if it is unfavorable to the victim or is not desired by the victim (Paragraph 3 of the same Article).

Also, in case of questioning an abuse victim with a disability as a witness, a court may, when requested by the person in question or by a prosecutor, allow the witness to be accompanied by a person whom he or she trusts (Article 59-8(2) of the Act on Welfare of Persons With Disabilities). Upon receipt of a motion from a person with a developmental disability him or herself, prosecutor, guardian, or the head of the relevant support center for persons with developmental disabilities when a court intends to examine the person with a developmental disability as a witness, it shall allow him or her to be accompanied by a person who has a reliable relationship therewith, except in unavoidable circumstances, such as where the judicial proceeding is likely to be substantially hindered (Article 12(3) of the Act on Persons With Developmental Disabilities).

### **C) Statement Assistant**

The Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes provides that, if the victim of a sexual crime is a child under the age of 13 or has difficulty in understanding or communicating due to any physical or mental disability, the court may, ex officio or upon request by the public prosecutor or the victim or his/her legal representative or counsel, decide to allow an intermediary to mediate or assist in communication by participating in the examination of the witness to facilitate the examination (Article 37(1)). The court, in such cases, shall notify the victim and his/

her legal representative and counsel, prior to his/her examination, that they can request mediation or assistance to communicate through an intermediary (Paragraph 2 of the same Article). The Minister of Justice shall train intermediaries to assist victims of sexual crimes having difficulty in understanding and communication in criminal judicial proceedings (Article 35(1)), and an intermediary shall be a person who completes a course of education determined by the Minister of Justice among those who have expertise in a field related to the psychology of or communication with children and persons with disabilities, such as psychiatry, psychology, the science of social welfare, or education, or who have served in such field for a considerable period (Paragraph 2 of the same Article). Each intermediary shall endeavor to maintain a neutral position in trial proceedings to ensure that statements are mutually communicated to each other without distortion (Article 38(1)). In addition, no intermediary shall disclose or divulge to any third person a victim's name, address, age, occupation, alma mater, appearance, and other personal information by which it is possible to ascertain the victim's identity, photograph, and privacy, which he/she has learned in the course of performing his/her duties (Paragraph 2 of the same Article).

In actual practice, one possible issue is what measures to take when a witness who is a victim of crimes other than sexual crimes requests the participation of a statement assistant because of his/her difficulty with communication or expression due to a physical or mental disability. This issue may occur when a defendant or a witness who is not a victim makes the same request because of difficulty with communication or expression. Currently, there is no legal basis for appointing a statement assistant in criminal proceedings. However, Article 26(6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities provides that "a judicial

institution shall confirm whether a person related to a case has a disability in communication or expression of opinion, and inform such person with a disability of the fact that he/she may receive assistance in criminal proceedings and of the details of such assistance. In such cases, if the relevant person with a disability requests assistance in criminal proceedings, the institution shall not refuse such request without good cause and take necessary measures therefor.” Article 17(1) of the Enforcement Decree of the same Act provides that “a public agency or its members shall provide braille materials, optical character readers, Korean sign language, proxy reading, voice support systems, computers, AAC and other rightful conveniences upon receiving a request from a person with a disability to use judicial and administrative procedures and services, or participate therein.” Based on these provisions, the court should assign assistants for a defendant, a witness who is a victim of crimes other than sexual crimes or a witness who is not a victim, insofar as it is feasible, so that such assistants may mediate or aid communication. In the long term, the court should designate or employ people with expert knowledge on psychology and communication with people with disabilities, or people with considerable experience in the field as assistants for people with disabilities to fulfill the purpose of the Act.

Also, where a statement assistant participates in litigation, a preliminary interview with the victim may help in communication by understanding the characteristics of the victim and establishing a reliable relationship. Thus, it would be desirable to grant preliminary interview time.

#### **D) Whether to Acknowledge Plural Participants in Litigation**

For a person related to the litigation of a person with disability, it may be at issue whether a statement assistant, a person in a reliable relationship, and defense counsel may be applied in duplicate. A statement assistant

helps in communication by explaining questions to a victim of crime with a disability who has difficulty stating his/her damage clearly. A person in a reliable relationship was adopted to relax the body and mind of the defendant or victim by being next to him/her when he/she testifies. The victim's lawyer plays certain roles, such as the submission of an opinion of the victim of a crime of sexual violence or abuse to the prosecution or court in a form of a written opinion, and explanation of the circumstances of the case. As long as the role of each is different from the role of a person related to a case, it would be reasonable to permit the application in duplicate, provided that the necessity therefor is acknowledged.



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## 2 Before Indictment

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### A. Direct Judgment of Warrant

#### 1) Before Suspect Examination Date

Article 26(6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities prescribes the obligation of a judicial agency to ascertain whether a person related to a case has a disability in communication or expression of opinion, and to inform the person with a disability that he/she may be provided with assistance in criminal proceedings. Therefore, when a judge identifies a disability of a suspect and its grade through the investigation reports, the judge should instruct the relevant clerks to prepare in advance the assistance required on the examination date using an appropriate method such as attaching a note on the records. The judge who presides over the examination should ensure that a suspect with a disability is provided with rightful conveniences by reviewing the required judicial assistance and checking whether it has been prepared.

According to Article 201-2(8) of the Criminal Procedure Act, the court should appoint a defense counsel ex officio when the criminal suspect to be examined has no defense counsel. In cases where the suspect is found to have a disability, the court official should ensure that the suspect with a disability may receive meaningful assistance from the defense counsel by informing the attorney of such disability and the grade thereof to ensure the appropriate exercise of defense for the suspect, or having a sign language interpreter designated in advance as required.

Compared with people without a disability, there are a limited number of

ways for a suspect with a disability to acquire information regarding criminal proceedings. Therefore, the court should provide a suspect with a disability with a guide on suspect examination before detention. With this, the court should provide the “Guide on Suspect Examination before Detention” (Annex 6) through the defense counsel in advance, or no later than the beginning of the examination.

When serving a notice of the date of the examination to determine whether to issue a warrant of detention, the notice is printed with a 2D bar code for optical character readers. However, according to Article 96-12 of the Regulation on Criminal Procedure, the notice of examination date may be made in writing, by telephone, facsimile, e-mail, mobile text message service, or by other expeditious means. Therefore, the judge who designates the examination date, upon learning that the suspect is a person with a visual impairment, should instruct a court official to provide a notice of the examination date in a manner appropriate for the suspect’s disability (for example, telephone) to ensure that the suspect is notified.

In cases where the suspect requires interpretation on the examination date, the court should instruct a court official to select candidates from the interpreter list and designate a sign language interpreter from among those candidates. In cases where written interpretation is required, the court should arrange for a stenographer, etc. to be present on the examination date after verifying whether the courtroom has the equipment to provide written interpretation.

## **2) Proceedings on Suspect Examination Date**

### **A) Personal Identification Question**

Article 26(6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities prescribes the obligation of a judicial institution to

ascertain whether a person related to a case has a disability in communication or expression of opinion. In cases where a judge presiding over a suspect's examination before detention believes that a suspect has difficulty with communication or expression because of his/her disability, the judge should ask the suspect if he/she has a physical or mental disability, and then inform the suspect of possible assistance that can be provided by the court.

Here, "disability" is not restricted to the disability types specified in the Act on Welfare of Persons With Disabilities. Rather, it refers to disability in a broader sense, including difficulties with communication and expression, which may interfere with the suspect's participation in court proceedings. In other words, the concept of people with disabilities under the Act on Welfare of Persons With Disabilities is established not for access to the court system by people with disabilities but as the standard for welfare services, such as registration of people with disabilities, disability allowance, support for self-reliance, auxiliary appliances for persons with disabilities, etc. provided under the same Act. Thus, the concept and category of people with disabilities subject to access to the court system by people with disabilities shall be separately construed based on definite circumstances. Therefore, the judge presiding over the examination should ask the suspect if he/she has a disability. For example, the judge may ask, "Do you have any physical or mental difficulty or disability affecting your participation in the procedures?" or "Do you have difficulty with the communication or expressions required for the proceedings?"

Furthermore, the judge may not reject a suspect's request for assistance during criminal proceedings without justifiable grounds, and should actively provide the requested assistance insofar as it is necessary and available. In cases where the assistance requested by the suspect is not immediately available during examination, the judge should explain to the suspect why

it is not available, and ensure the clarity of the relevant procedures by indicating the requested assistance and measures taken in the examination protocol.

### **(1) Designation of Interpreter**

In cases where a sign language interpreter has not been designated for a suspect with hearing impairment or speech impediment requiring such interpreter before the examination date, the court may need to change or postpone the examination date to a date when a sign language interpreter is available, based on the opinions from the public prosecutor, the suspect, etc.

In cases where a suspect is accompanied by his/her own sign language interpreter, the court may either have the accompanying interpreter take an oath and perform interpretation or set a new court date and designate a sign language interpreter from the interpreter list, after comprehensively considering the relationship between the sign language interpreter and the suspect, the skills and qualifications of the interpreter, and the opinions from each party involved in the examination procedure. However, even if an accompanying interpreter was not designated as the interpreter for the examination date, the suspect with a disability may request the court's permission for the accompanying interpreter to sit with the suspect as a person related to the person with a disability.

To protect the suspect's right to defend him/herself, the court should use caution when designating a sign language interpreter who has performed interpretation for the investigating institutions, such as the police or prosecutor's office, as the interpreter for examination regarding whether to issue a warrant of detention. Even if there is no time to designate a new sign language interpreter, or other similar circumstances exist, the court should designate another sign language interpreter for the examination if the suspect

expresses an objection against such interpreter.

Article 201-2(1) of the Criminal Procedure Act provides that the judge should, upon receiving a request for a warrant of detention of a suspect, hold a hearing to examine the suspect without delay. According to Articles 201(2), 209, 71, and 71-2, the judge should, upon receiving a request for a warrant of detention of a suspect, issue a warrant of detention for compulsory appearance if there is probable cause to believe that the suspect committed the crime, and examine the suspect upon his/her compulsory appearance; however, a suspect who has been ordered to make a compulsory appearance should be released within 24 hours from the time he/she was taken into custody when it is determined unnecessary to detain him/her, and when confining a suspect in a correctional facility, a detention house, or a police station's jail, the confinement period may not exceed 24 hours from the time of being taken into custody. Therefore, the judge should take care to comply with the above timeline when proceeding with examination with a designated sign language interpreter.

## **(2) Sitting With Person in a Reliable Relationship or Person Related to the People With Disabilities**

According to Articles 201-2(10) and 276-2(1) of the Criminal Procedure Act, the presiding judge or a judge may, when he/she examines a suspect, allow a person who has a reliable relationship with the defendant to accompany the suspect, ex officio or upon receiving a request of the suspect or his/her legal representative or the public prosecutor, if the suspect lacks the ability to discern right from wrong or to make and communicate a decision because of a physical or mental disability; or if it is necessary to facilitate the suspect's psychological stability and smooth communications in light of his/her age, gender, nationality, or any other factor. Therefore, if a suspect's

disability makes it difficult for the suspect to exercise his/her right to defense during a meeting with the defense counsel or suspect examination before detention, the judge should allow the person in a reliable relationship with the suspect to sit with the suspect and assist him/her.

According to Article 20(2) of the Act on the Prohibition of Discrimination Against Persons With Disabilities, no person shall compel, interfere with, or treat unfairly persons related to persons with disabilities who support their communication, such as representing and accompanying persons with disabilities for the purpose of Korean sign language interpretation, braille conversion, braille proofreading, reading, ghostwriting or direction, without good cause. Therefore, if a suspect having difficulty with communication requests the court's permission for the accompaniment of a related person, or even if such suspect does not make such request, the judge should ask the suspect if he/she wants a related person to accompany him/herself, and allow the related person to participate in the examination to assist with the person with a disability.

## **B) Suspect Examination**

When conducting a suspect examination before detention, the court should consider the following guidelines to ascertain whether the suspect is a person with a disability.

### **(1) People with Visual Impairment**

A judge presiding over examination should read the warrant for a suspect with visual impairment, and personally ask the suspect if the warrant was shown to the suspect in a way that he/she can understand. "Showing the warrant" when executing an arrest warrant under Articles 85(1) and 200-6 of the Criminal Procedure Act presupposes that the warrant is shown in a way

that allows the suspect to perceive the contents of the warrant; if the warrant is shown in a perfunctory manner during execution of the warrant, a suspect with visual impairment is likely to be arrested without knowing what he/she is suspected of, which will greatly undermine the suspect's right to defense.

The same issue may arise in relation to notification of the reasons for arrest during a warrant's execution. Because every prosecutor or judicial police officer shall, whenever arresting a criminal suspect, notify the criminal suspect of the gist of the suspected crime, the reasons for arrest, and the right to appoint defense counsel and shall also give an opportunity to vindicate himself (Article 200-5 of the Criminal Procedure Act), a judge presiding over examination before detention should personally ask the suspect if he/she was notified of the reasons for his/her arrest and the right to appoint a defense counsel in a way that he/she can understand.

## **(2) Person With Hearing Impairment**

When the suspect is a person with a hearing impairment, a judge presiding over the examination before detention should personally ask the suspect if he/she was notified of the reasons for the arrest and the right to appoint a defense counsel in a way that he/she can understand. If the suspect is able to read, the suspect should be shown a document indicating such reasons and rights, or notified of the same using sign language if the suspect is proficient in sign language (the Human Rights Protection Center of the Police Department uses a standard sign language translation of the Miranda principle to give notification). In cases where an investigation institution has arrested a suspect without realizing the suspect is a person with hearing impairment before the arrest, the institution should notify the suspect of the reasons and right as per the above without delay, using a means of communication confirmed to be appropriate for the suspect. The judge

should ensure that notification was given in the way described above during examination.

### **(3) Person With a Mental Disability**

When notifying the suspect of the purpose and details of examination to determine whether to issue a warrant of detention, the judge should be considerate of the intellectual capability of a person with mental disability and refrain from using technical legal terms; terms which are easily comprehensible by the person should be used instead. If the suspect does not comprehend even those terms, the judge should repeat the explanation. In addition, the judge should not speak fast or urge the person with a disability to speak faster. When asked a vague or complicated question, a person with a mental disability is highly likely to have difficulty in understanding the meaning of such question. As to even a statement on the same fact, the answer thereto may differ depending on how the question is asked. A statement may be distorted if a suspect with a mental disability follows or complies with a leading question that includes or implies what a questioner wants. Thus, where the suspect examination is performed on a person with a mental disability, it would be desirable to use non-leading and open questions so that the suspect can answer in a voluntary and flexible way. Also, it would be better to avoid leading questions and closed questions that lead to “Yes/No” answers.

## **B. Review of Legality of Detention and Arrest, and Hearing for Ruling for Allowance of Release on Bail**

The guidelines applicable to examination of whether to issue a warrant



should be also considered during a review of the legality of detention and arrest, or hearings for ruling for allowance of release on bail. However, a review of the legality of detention or a ruling for allowance of release on bail presupposes the completion of the suspect examination regarding whether to issue a warrant of detention. Therefore, the judge should determine what types of judicial assistance were provided for a suspect with a disability during such examination, and ensure that the required assistance was provided.

In particular, because the judge should appoint a public defender for a criminal suspect without defense counsel when conducting a review of the legality of detention and arrest under Article 214-2(10) of the Criminal Procedure Act, when a criminal suspect has been confirmed to have a disability, the judge should have a court official notify the public defender of the disability and its grade, and designate a sign language interpreter if required.

There is no provision that allows for a person in a reliable relationship to sit with the suspect during a review of the legality of detention and arrest. However, because Article 4(1)5 of the Act on the Prohibition of Discrimination Against Persons With Disabilities prohibits unjustified discriminatory acts against a person related to people with disabilities, such as restriction, exclusion, segregation, or denial, and Article 26(6) of the same Act provides that a judicial institution should not refuse a request for assistance in criminal proceedings without justifiable grounds, when a suspect requests the court's permission for a person related to the person with a disability to sit with the suspect to assist during the review of legality of detention and arrest, the court should allow the related person to sit with the suspect with a disability insofar as it does not interfere with the proceedings to ensure that the suspect may exercise his/her right to defense in a meaningful way.

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## **3 After Indictment and Before the First Criminal Trial Date**

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### **A. Service of Duplicate Copy of Written Indictment**

When a defendant has been confirmed to have a disability based on the written indictment, etc., the presiding judge needs to make preparations to ensure the defendant with a disability can receive appropriate assistance from the court.

The bench, upon receiving a written indictment, serves the defendant with a duplicate copy of the written indictment along with the statement of opinion form. Where a defendant has been confirmed to have a disability, the defendant needs to be served with the Guide on Judicial Assistance (Convenience Provision) for People With Disabilities (Annex 1), the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities (Annex 2), and the Guide on Criminal Procedures (Annex 7) along with the above documents to accurately verify the defendant's disability type and grade in a timely manner, and notify the defendant of the fact that he/she may receive judicial assistance from the court, and how to apply for such assistance.

The duplicate copies of a written indictment do not include a 2D bar code for optical character readers. A related issue is whether it is appropriate to serve a defendant who is confirmed to have a visual impairment with a duplicate copy of the written indictment in printed form. In light of the fact that Article 26(6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities stipulates that a judicial institution shall confirm whether a person related to a case has a disability in communication or

expression of opinion, and inform such person with a disability of the fact that he/she may receive assistance in criminal proceedings and of the details of such assistance, the court should have a court official ask the defendant whether he/she wants the duplicate copy converted, and which format he/she needs; if the defendant wants such conversion, the court official should convert the documents insofar as it is possible, and serve the converted documents again with the original duplicate of the written indictment, so that the defendant may compare the converted version with the original indictment. For reference, Article 4 of the Established Rule on Interpretation provides that if the note box of the written indictment indicates that the defendant is not capable of comprehending Korean, the court official should send the Korean written indictment along with the translated version attached to it, if there is any, or otherwise request the presiding judge to determine whether to translate the written indictment.

## **B. Notification of the First Criminal Trial Date**

### **1) Public Defender**

#### **A) Necessity**

Article 275-3 of the Criminal Procedure Act provides that “pleadings in the courtroom should be made oral.” Under this provision, most criminal proceedings conducted in the courtroom—notification of the right to refuse to make a statement (Article 283-2(2)), personal identification question by the presiding judge (Article 284), opening statement of public prosecutor (Article 285), opening statement of defendant regarding admission of indicted facts or favorable facts (Article 286), and recitation of documentary evidence during investigation (Article 292)—are made orally. If a defendant’s disability makes

it difficult for the defendant to defend him/herself during oral hearings, such defendant is likely to participate in the hearings without properly reviewing the questions or the results of evidence examination related with the indicted facts, which would prevent his/her effective exercise of the right to defense.

### **B) Articles 33(1)4 and 5 of the Criminal Procedure Act**

The court shall appoint a defense attorney ex officio if the defendant has a hearing impairment or speech impediment, or if the defendant is suspected of having a mental disorder (Article 33(1)4 and 5 of the Criminal Procedure Act).

The Criminal Act provides that a person who, because of a mental disability, is unable to discriminate between right and wrong or to control his/her will, should not be punished (Article 10), and punishment should be mitigated for the acts of people with hearing impairment or speech impediment (Article 11). The purpose of including hearing impairment / speech impediment or suspected physical/mental disability as a ground for appointing a public defender under the Criminal Procedure Act is to supplement the capability of the defendant to defend him/herself; such purpose does not necessarily coincide with the purpose of exempting or mitigating criminal responsibility under the Criminal Act. In light of the guarantee of the right to defense, in addition to people with hearing impairment, speech impairment or physical/mental disability, the following people may experience difficulty in defending themselves: people with visual impairment; people with hearing impairment who can speak but cannot hear; people with speech impairment who can hear but cannot speak; people with severe physical disability or brain lesion disorder, etc. In such cases, it is required to apply Article 33(3) of the Criminal Procedure Act stated below. This provision obliges the court to appoint a public defender ex officio, when

it is recognized as necessary to protect the defendant's right, even where the circumstances do not fall under any of Subparagraphs that enumerate the grounds for appointing the public defender. This is because the case with people with disabilities may fall under when it is recognized as necessary to protect such right.

### **C) Article 33(3) of the Criminal Procedure Act**

When the court deems it necessary to protect the rights considering the age, intelligence and level of education, etc. of the criminal defendant, it shall appoint a defense counsel within the scope that does not go against the explicit intention of the criminal defendant (Article 33(3) of the Criminal Procedure Act).

Other than the cases that fall under Article 33(1)4 and 5 of the Criminal Procedure Act, if the defendant is a person with a disability and the court deems it necessary to protect his/her rights considering the age, intelligence, level of education, and grade of disability of the defendant (for example, if the defendant cannot be expected to properly exercise his/her right to defense on account of having lost his/her hearing after learning to speak, or having lost his/her vision), the court needs to appoint defense counsel within the scope that does not conflict with the explicit intention of the defendant. To that effect, the Supreme Court has held that the law was violated when even though the defendant was a person with a Grade 2 visual impairment and had substantial difficulty in accessing information in printouts, a trial was conducted without selecting a public defender for the defendant (Supreme Court Decision 2010Do881 of April 29, 2010). Also, the Supreme Court has held that the law was violated when even though the defendant was a person with Grade 3 hearing impairment and had substantial difficulty in exercising his/her right to defense in oral pleadings, a trial was conducted without

checking the degree of hearing impairment and after dismissing his/her motion to select a public defender (Supreme Court Decision, 2010Do4629 of June 10, 2010).

Articles 6(2) and 8(1) of the Established Rule on Public Defense provide that the court should appoint a public defender without delay if the defendant falls under Article 33(3) of the Criminal Procedure Act or if the defendant is a person with visual impairment, unless the defendant clearly expresses that he/she does not want a public defender appointed. Therefore, if the defendant is a person with visual impairment, the court should appoint a public defender before the first trial date unless the defendant does not desire such appointment. The scope of person with visual impairment under said Rule might be questioned; even if a defendant is not a person with visual impairment under the Act on the Welfare of People With Disabilities, the court needs to appoint a public defender if it has verified that the defendant experiences difficulty with accessing information through visual materials, based on the statement of opinion submitted by the defendant.

## **2) Preparation for Judicial Assistance**

After confirming that the defendant has a disability through the statement of opinion or the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities submitted by the defendant, the presiding judge should report the type and grade of such disability to court official and instruct them to prepare to provide the appropriate conveniences on the trial date.

Preparations to be made for each disability type are as follows:

### **A) Hearing Impairment and Speech Impediment**

#### **(1) People Requiring Sign Language Interpretation**

Article 181 of the Criminal Procedure Act provides that “a statement by a deaf or mute person may be required to be interpreted by an interpreter.” Therefore, upon learning that the defendant is a person with hearing or speech impairment, the court should serve the Guide on Interpretation Service for People With Disabilities (Annex 3) and designate a sign language interpreter if the defendant wants sign language interpretation, unless it is clearly deemed that such interpretation is not necessary. Even if the defendant does not want interpretation, the court needs to designate a sign language interpreter if the defendant’s counsel considers it necessary to have an interpreter based on his/her experience with the defendant during the meeting with the defendant.

As previously mentioned in relation to examination to issue a warrant, to protect the suspect’s right to defend him/herself the court should use caution when designating a sign language interpreter who has performed interpretation for the investigation institutions such as the police or prosecutor’s office as the interpreter for hearings. If a sign language interpreter who has performed interpretation for the investigating institutions is designated and present for the trial, it is likely that such designation will call the fairness of the trial into question, and the trial may be affected by statements made by the defendant in front of such interpreter at the investigation institutions. Therefore, barring special circumstances, the sign language interpreter should be an interpreter who did not perform interpretation during investigation. Objections from the defendant in this regard should be given particular consideration.<sup>34)</sup>

Moreover, where a person with a hearing impairment is not proficient in sign language or a sign language interpreter is not accustomed to the

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34) However, where the pool of sign language interpreters managed by the court is small, a person who interpreted in an investigation may interpret in a trial as well. In such case, the court shall inform the sign language interpreter of the need to separate the investigation from the trial.

natural sign language, it may be necessary to designate both a sign language interpreter and a sign language interpreter with hearing impairment.

To provide appropriate and smooth interpretation, the court should inform the designated interpreters of guidelines on the “Interpreter Guide” (Annex 4) using the appropriate means of communication, and serve the duplicate copy of the written indictment in advance via e-mail or facsimile (refer to Article 4(3) of the Established Rule on Interpretation). In addition, the court needs to acquire the list of questions, statement of opinion, and brief from the prosecutor and the defense counsel, and provide them to the sign language interpreter. In such cases, the court should take care to prevent the personal information of the sign language interpreter from being disclosed to the defendant or witnesses so that they cannot try to contact the interpreter.

For a trial that is conducted for 30 minutes or less, 1 sign language interpreter might be sufficient. Otherwise, the court shall substitute the sign language interpreter in the middle of the trial.

Each court should, upon receiving a case for which interpretation service is not available, notify the Minister of National Court Administration (via the Chief of Judicial Procedure Office) of such fact, and the Minister of National Court Administration (the Head of the Judicial Assistance Office), upon receiving such notification, should find an appropriate interpreter and notify the court (refer to Article 8 of the Established Rule on Interpretation).

## **(2) People Requiring Written Interpretation**

For a person with hearing impairment who has difficulty with communicating legal terms or complicated facts of the case through sign language interpretation, or who is not proficient in sign language or oral conversation, written interpretation based on stenography is required.

Article 73 of the Regulation on Criminal Procedure provides that “when



a witness cannot hear, questions may be made in writing, and when he/she cannot speak, answers may be made in writing.” When the defendant is a person with hearing impairment with limited proficiency in sign language, but is capable of reading and writing, provision of written interpretation may be a useful alternative. In such cases, written interpretation may be shared through the courtroom screen, as is the case for civil procedures (refer to page 93 or the below).

A defendant with a hearing impairment may not recognize his/her case when the case number and he/she were called. Thus, sign language interpretation or written interpretation may be needed from when the case number and the defendant are called. Regarding written interpretation, if characters displayed on the screen are too large, the next page will be displayed too fast and thus it might be difficult to understand. On the other hand, if the characters are too small, it might be difficult for a person with hearing impairment to read and understand them. Thus, the court shall check the font size before conducting the trial. Also, characters at the bottom or top of the screen might not be visible depending on the position of the screen or the person with disability. Thus, the court shall check the proper position of characters projected on the screen.

## **B) Mental Disabilities**

A person with mental disability may fail to understand the available conveniences, their necessity, and how to request such conveniences, and thus fail to make such request. Therefore, the court should not conclude that a person with a mental disability does not require such conveniences as participation of a related person or presence of a person in a reliable relationship, solely based on their own statement. Even if the defendant does not request such conveniences, the court needs to carefully examine the state

of the person with a disability, and provide the required conveniences if it deems them necessary.

### **3) Cautionary Note on Preparation Before the First Criminal Trial Date of a Formal Trial**

When a defendant requests a formal trial after receiving a summary order, under Articles 365 and 458(2) of the Criminal Procedure Act, if the defendant does not appear on the date set for trial, another date shall be set. However, if the defendant does not appear on the subsequent date without proper reason, the judge may pronounce a judgment without the defendant's statement in court. In cases where the defendant has been confirmed to have visual impairment, the presiding judge needs to instruct a court official to notify such person in advance viatelephone, in addition to serving the summons.

## **C. Inspection or Copying of Investigative Documents Before Submission of Evidence**

### **1) Request for Inspection or Copying by Defendant**

In cases where a person with visual impairment files an application with the prosecutor for the inspection or copying of the documents in the prosecutor's custody after indictment under Article 266-3(1) of the Criminal Procedure Act, it may be questioned whether the court may order the prosecutor to allow the person with visual impairment to inspect or copy such documents in a format perceivable by the person.

Both copying and inspection will be relevant if the defendant with visual impairment does not have a defense counsel (because of the refusal of

appointment of public defender, etc.), and only inspection will be relevant if the defendant is represented by defense counsel (refer to a proviso to the same Article). In cases where the public prosecutor provides the above documents in a format that the person with visual impairment cannot understand, whether Paragraph 2 of the same Article applies will be determined based on whether it constitutes a case in which a prosecutor refuses to allow the inspection, copying, or delivery in writing, of documents or places a limitation thereon, as prescribed by Article 266-4(1) of the Criminal Procedure Act.

Some argue that such provision does not constitute refusal or limitation under Article 266-4(1) of the Act as long as the prosecutor allowed inspection and copying of the documents, although it may constitute a discriminatory action under the Act on the Prohibition of Discrimination Against Persons With Disabilities. Others argue that such refusal or limitation should be deemed as a de-facto refusal of inspection and copying under the purpose of the Act on the Prohibition of Discrimination Against Persons With Disabilities, and the court, considering the diverse conditions of Paragraph 2 of the same Article, should order the prosecutor to allow the defendant to inspect and copy the documents in the format required by the defendant (braille, electronic file, or enlarged fonts) or to provide such documents to the defendant.

## **2) Request for Copying by Defense Counsel**

One related issue is whether a court may order the prosecutor to allow copying of a document in the prosecutor's custody after indictment by specifying a certain method of copying in cases where defense counsel requests the prosecutor to allow copying of such documents in a format that can be understood by the defendant, and such request was subsequently rejected.

Regarding this issue, some argue that a proviso to Article 266-3(1) of

the Criminal Procedure Act, which provides that a defendant with a defense counsel may only request the inspection of documents, presupposes that the defendant can review the documents copied by the defense counsel, and for that reason, the court should grant such request from the defense counsel for the sake of protecting the defendant's right to access the records and to defend him/herself, in accordance with the purpose of the Act on the Prohibition of Discrimination Against Persons With Disabilities (in particular, refer to Article 26(6), which provides that when a person with a disability requests assistance in criminal proceedings, a judicial institution should not refuse such request without good cause, and must take necessary measures therefor).

## **D. Utilization of Trial Preparation Date**

In cases where the defendant has been confirmed to have a disability, the court should set the trial preparation date to identify the defendant's state in advance, and prepare the trial proceedings in accordance with the type and grade of such disability.

That is, a defendant with a visual impairment requires consideration of how to examine evidence requiring visual perception; the first trial date may be delayed in the event that a defendant has a hearing impairment because of the appointment of an interpreter. In a case where a person with a mental disability is the defendant or victim, it might be difficult to understand and communicate the procedures and details of the trial due to his/her lack of intellectual capacity, disability in thinking capacity, etc. The panel shall explain in terms as plain as possible and provide proper assistance to help in communication and expression of opinions so that an issue of the case

is established definitely and evidence can be examined intensively on the trial date. The panel may use the trial preparation date to ensure a sufficient understanding of the related issues in advance, and plan the proceedings in ways suitable for the relevant type of disability.

## **E. Setting of the First Criminal Trial Date**

The court should avoid times of day with high traffic when setting the date for a person with a physical disability or a brain lesion disability who is not subject to detention. In addition, to minimize the time spent in waiting and ensure a meaningful hearing, the time of hearing should be set to allow for sufficient time between the hearing and the adjacent hearings. Moreover, the court should be considerate of the fact that a person with a severe physical disability or a brain lesion disability may find it difficult to sit in a wheelchair for a long time, and that the hearing may take longer than other hearings due to the involvement of a person with a disability. If the court building is not accessible using a wheelchair because of a lack of elevators, etc., the court needs to consider securing a courtroom on the first floor, or using another courtroom that is easily accessible (to hold a session of a trial in a place other than the court, the permission of the chief judge of the court is required, as per Article 56(2) of the Court Organization Act).

Furthermore, hearings involving people with hearing or visual impairment may also take longer than other hearings, and the court should be considerate of this point when setting the date for such hearings.

Where it is necessary to explain and proceed with the court proceedings and help a person with a developmental disability communicate or understand, the panel may use a person related to the person with a disability,

a person in a reliable relationship, etc. As a result, it may take more time to proceed with the trial. Therefore, it is necessary to designate the trial dates in consideration of the circumstances stated above.

A person with a mental disability may lose his/her focus easily and need separate assistance for communication due to the deterioration of cognitive capacity or a speech disability caused by a long history of medicating for mental illness, and thus require frequent rest. In this situation, such a person will experience difficulty with speaking at a fast pace. Therefore, the hearing involving such people should be set apart from the other cases to allow for sufficient time. For the same reason, to minimize the waiting time, such hearing should not overlap with other cases.

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## **4 Hearing on Trial Date**

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### **A. Cautionary Notes for Each Disability Type**

#### **1) Visual Impairment**

If the presiding judge focuses only on the efficiency of the proceedings, a defendant with a disability may not be able to properly exercise his/her right to defense. The presiding judge should take time to go through the procedures under the principle of an oral hearing under the Criminal Procedure Act so that all evidence may be presented in the courtroom in ways that the defendant may perceive.

During the examination of documentary evidence, a person with a visual impairment may require a detailed description of their contents. This may extend the time required for the trial compared with other cases. The above factors should be considered when setting a trial date.

#### **2) Hearing Impairment and Speech Impediment**

Where people with disabilities who have difficulty in communicating with voice, such as a person with hearing impairment, etc., are involved in a case, it is required to properly use written interpretation, sign language interpretation, etc., from when the case is called, provided that the presiding judge knows such fact in advance. If the presiding judge does not know about the disability in advance, the judge shall follow the procedures required for identification of the person related to a case and provision of judicial assistance through handwriting on paper, etc. However, the presiding judge shall conduct the remainder on the next trial date after preparing sufficient

communication methods. A sign language interpreter may have difficulty with interpreting fast conversations or difficult legal terms. For this reason, the presiding judge should frequently ask the interpreter if interpretation is being properly performed, and take appropriate measures such as adjusting the speed and length of conversation, or rephrasing technical terms or difficult words into more plain language. To this end, before interpretation, the presiding judge should inform the sign language interpreter that he/she may tell the presiding judge if accurate interpretation is not achievable because of certain circumstances, or if the interpreter has a request regarding interpretation. The same applies to written interpretation.

The presiding judge should consider the fact that in cases where sign language interpretation is required, even a simple question or answer may require a considerable amount of time.

In addition, in cases where the written indictment, defense brief, questions for the defendant, or questions for witnesses have been submitted in advance, the presiding judge should send a duplicate copy of such documents to the interpreter through a court official involved with the case so that the interpreter may prepare for interpretation in advance (Article 12 of the Established Rule on Interpretation).

The court shall, upon a motion from a prosecutor, a criminal defendant or a defense counsel, assign a stenographer to take stenographic notes of a hearing in the court, in whole or in part, or make audio or video records. The court may also order ex officio to take such notes or make such recording (Article 56-2(1) of the Criminal Procedure Act). Such stenographic notes or audio or video records are kept separately from the protocol of the trial (Paragraph 2 of the same Article). They may be preserved in an electronic form, and once the case is closed, should be destroyed (Article 39 of the Regulation on Criminal Procedure). Any prosecutor, criminal defendant, or



his/her defense counsel may request the court to furnish him/her with copies of the stenographic notes, audio or video records by bearing the expense for such copying (Article 56-2(3) of the Criminal Procedure Act). However, according to Article 13 of the Established Rule on Interpretation, a court official involved should record the interpretation during the hearing, in whole or in part. Moreover, unless such recordings are included as a part of the protocol, such recordings should be kept until the decision of the relevant instance is pronounced, notwithstanding Article 39 of the Regulation on Criminal Procedure.

Therefore, the court should record the proceedings when a defendant with a hearing impairment or visual impairment is provided with sign language interpretation by applying Article 56-2(1) of the Criminal Procedure Act or Article 13 of the Established Rule on Interpretation, even when the party does not make such request. In such cases, the court may need to keep the recordings not until the judgment is rendered at this trial level but until the case is eventually closed. Therefore, the presiding judge should use caution when determining how long the recordings of a hearing with sign language interpretation should be kept. Furthermore, for the purpose of ensuring accurate sign language interpretation and the smooth handling of objections regarding interpretation, video recording is more suitable than audio recording. Therefore, if equipment or personnel for video recording are available, the presiding judge needs to consider having the defendant or his/her defense counsel request video recording, or ordering such recording ex officio in accordance with Article 56-2 of the Criminal Procedure Act.

Moreover, the court should use a designated interpreter rather than an accompanying interpreter barring special circumstances; however, when neither party objects to the accompanying interpreter and the interpreter stays neutral and has sufficient interpretation skills, an accompanying interpreter

can be used. However, the court should allow a related person (acquaintance, volunteer, etc.) to sit with the defendant to provide assistance even if such interpreter is not designated as an accompanying interpreter, barring special circumstances in which such person interferes with or poses a risk of interfering with fair proceedings. Such person related to the person with a disability who is not designated as an interpreter may sit with the defendant with a disability and verify the accuracy of interpretation performed by the designated interpreter for the defendant.

### 3) Mental Disabilities

Among people with mental disabilities, many people with developmental disabilities experience difficulty with communicating or expressing their opinion. For smooth communication, a person to mediate or aid such communication is required. The Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes includes a provision that allows an intermediary to participate in the trial proceedings if the victim of a sexual crime is a child under the age of 13 or has difficulty in understanding or communicating due to any physical or mental disability (Article 37). However, there is no such provision in the laws, special acts, etc. on criminal proceedings for a statement assistant in cases where the defendant in criminal cases including sexual crime, etc. has disabilities. Despite this, in light of Article 26(6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities and Article 17(1) of the Enforcement Decree thereof, the court needs to appoint appropriate assistants to mediate and assist in communication for the defendant with a mental disability (refer to page 106 and the below for further details on the statement assistant). If there is a person related to the person with a disability accompanying the defendant with a disability to assist with his/her communication, the court should allow

such person to sit with the defendant and provide assistance.

## **B. Hearing on Trial Date**

### **1) Notification of Right to Refuse to Make a Statement and Personal Identification Questions**

The presiding judge shall inform the defendant that he/she has the right to remain silent or refuse to make a statement for an individual question (Article 283-2 of the Criminal Procedure Act) and confirm the identity of the criminal defendant by asking his/her name, age, reference domicile, domicile, and occupation (Article 284 of the Criminal Procedure Act). The court should order the defendant to report any change in his/her address to the court, and warn the defendant that the court may make a decision without the defendant's statement if his/her whereabouts are not confirmed (Article 18(1) of the Regulation on Special Cases Regarding Expedition of Litigation, etc.).

A person with a mental disability is likely to fail to grasp the meaning of the right to refuse to make a statement or the obligation to report changes of address; thus, the bench should explain such concepts in plain language (for example, "you don't have to speak if you do not want to, and don't have to answer if someone asks a question. On the other hand, you can say what you want to." "If you move, or your address changes, you have to let the court know as soon as possible. If you do not let us know, and we can't find out where you live, we may continue this trial without you.") After notifying the defendant, the bench needs to again confirm that the defendant understands the meaning of the words.

Considering the purpose of Article 26(6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities, the presiding judge

needs to ask the defendant whether he/she has a disability that may interfere with the proceedings, if there is reason to believe the defendant has such a disability. As previously mentioned, “disability” in this context is not restricted to the definition used under the Act on Welfare of Persons With Disabilities, but comprehensively includes all disabilities that may make the defendant experience difficulties with participating in the court proceedings. When asking the above questions, the presiding judge should be careful not to ask direct questions which may cause embarrassment or misunderstanding. Rather, the judge needs to ask indirect questions such as “Is there any physical or mental difficulty or issue that may affect the proceedings?”

The court should appoint a defense counsel ex officio when the defendant is a person with a hearing or speech impairment, or if the defendant is suspected of having a mental disorder (Articles 33(1)4 and 5 of the Criminal Procedure Act). If a defendant who does not fall under either of those categories expresses that he/she does not want defense counsel appointed before or on the first trial date, the presiding judge should ask why the defendant does not want a public defender, and persuade the defendant that defense counsel is necessary to protect the defendant’s right and facilitate communication. When the defendant still does not want a public defender after such persuasion, the court should indicate such fact in the protocol.

The presiding judge should immediately provide currently available assistance if the defendant or defense counsel requires assistance to exercise the defendant’s right to defense under Article 26(6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities. If the required assistance is not readily available at the time, the presiding judge should explain the reason and have it indicated in the protocol. Even in such cases, the court should make sure that the requested convenience is provided

as much as possible; for example, if alternative assistance is available, the presiding judge should actively recommend utilizing it.

## 2) Opening Statement of Prosecutor and Defendant

The prosecutor shall recite the facts charged, the name of crimes, and the applicable provisions of Acts as described in the bill of prosecution. In addition, the presiding judge may, if deemed necessary, have the prosecutor state outlines of the prosecution (Article 285 of the Criminal Procedure Act). The criminal defendant shall make a statement on whether he/she admits the facts charged after the prosecutor finishes his/her opening statement (Article 286(1) of the Criminal Procedure Act).

Despite being served with a duplicate copy of the written indictment before the trial date, a defendant with visual impairment or mental disability may fail to understand its contents. Therefore, the presiding judge should, even if defense counsel or a public defender has been appointed, have the public prosecutor read the entire facts of the case and verify whether the defendant properly understands those facts. For a defendant requiring sign language interpretation, the entire gist of the indictment should be interpreted.

Regarding the statement on whether the defendant admits to the indicted facts, the presiding judge should allow the defendant to state his/her opinion regardless of his/her disability and check with the defense counsel regarding whether the defendant's statement is genuine, allowing the counsel to add to the statement as required.

Moreover, the court may consider using the assistant system for the defendant as prescribed by Article 29 of the Criminal Procedure Act to protect the defendant's right to defense and facilitate communication.

For people with a developmental disability among the people with disabilities, the following shall be taken into consideration: their answers may

be subject to influence by the questioner's intention; and such people may provide different statements for the same facts depending on the time, the atmosphere, and the type of the question. Therefore, a confession about the indicted facts from a person with a developmental disability may not be credible. The presiding judge should use caution; for example, he/she may need to repeatedly verify the defendant's intention before taking the matter to a simplified trial procedure.

### **3) Interpretation**

#### **A) Scope of Interpretation**

A sign language interpreter interprets the entire proceedings if the defendant is a person with a hearing impairment, and interprets the proceedings during the examination of a witness if a witness is a person with a hearing impairment. The presiding judge orders the interpreter to perform interpretation, take an oath, and explain to the defendant or witness with a disability, using sign language, that the interpreter will perform interpretation in the courtroom, and has taken an oath to perform such interpretation with due diligence.

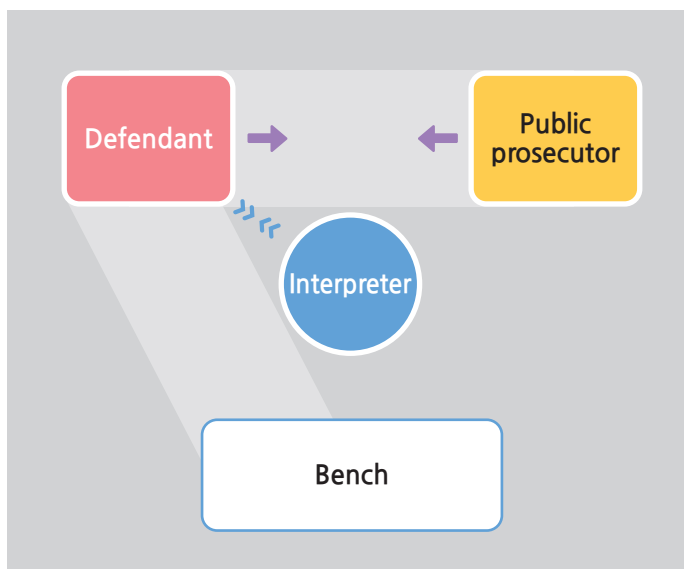
When setting the next trial date, the presiding judge should check the interpreter's schedule so that the same interpreter may continue to perform interpretation.

#### **B) Position of Sign Language Interpreter Within the Courtroom**

The sign language interpreter should be positioned at a place determined based on the opinions of the person with a hearing impairment and the interpreter. Many people with hearing impairment understand what the speaker says by reading his/her lips. Therefore, the seat of the interpreter should be placed at a position where the person with a disability can see both

the presiding judge and the interpreter—at the middle between the court official present and the witness stand where the person with a disability can look to both sides—to ensure easy communication and proceedings (Figure 3). As the seat for the interpreter, the court can temporarily set up an additional chair.

[Figure 3]



When a spectator with a hearing impairment requests interpretation of the proceedings, and the court finds it difficult or unnecessary to designate an additional interpreter for the spectator, the court may consider having the interpreter sit in front of the bench, facing the defendant, while slightly facing the spectator during interpretation.

During the examination of a witness, if the defendant is a person with a hearing impairment and the witness is not, the court should have the interpreter sit next to the witness so that the defendant may see both the witness and the interpreter. If both the defendant and the witness have a hearing impairment, the interpreter should be placed in a position where both the defendant and the witness can see both the speaker and the interpreter.

### C) Written Interpretation

Even when interpretation or a hearing aid is provided, written interpretation needs to be added to ensure accuracy of communication if the person with hearing impairment is literate. While there is no specific rule or

procedure related to the appointment of a written interpreter for people with a hearing impairment, the presiding judge can provide written interpretation by sharing stenographic records of all or part of the proceedings through the screen set up at the courtroom (refer to page 93 and the below for more details on written interpretation).

#### **D) Exclusion, Refraining and Challenge to the Interpreter or Objection Against Interpretation**

Provisions of the Criminal Procedure Act for the exclusion, refraining, and challenge of the judge are applied *mutatis mutandis* to interpreters (Article 25(1) of the Criminal Procedure Act). Where a sign language interpreter is a relative of the criminal defendant or a victim or the representative or assistant of the criminal defendant, such interpreter shall be excluded (Article 17 of the Criminal Procedure Act) or voluntarily refrain (Articles 18 and 24 of the Criminal Procedure Act). A public prosecutor or the defendant may challenge the interpreter if there is any concern that the interpreter may undermine the fairness of the trial with his/her interpretation. A ruling which dismisses a request for challenge may be appealed immediately (Articles 18, 23, and 25(1) of the Criminal Procedure Act).

Article 14 of the Established Rule on Interpretation provides that “when a defendant who is a foreigner expresses an objection against the accuracy of interpretation, the bench shall have the same examination and interpretation repeated if the person examined is still in the courtroom. If the person examined is not in the courtroom, the interpreter should be given a recording of the examination and perform interpretation again to clarify whether the interpretation matches what is recorded in the protocol of trial” (paragraph 1), and “when the accuracy of interpretation is not clarified through the procedure prescribed by paragraph 1 above, the bench should designate another interpreter for appraisal” (paragraph 2). Objections against sign



language interpretation can be handled based on the aforementioned Rule. However, as previously mentioned, because video recording is preferable to audio recording in court proceedings with sign language interpretation, the court should actively consider making video recordings of the hearings.

#### **4) Recital of Protocol of Trial**

The criminal defendant shall have a right to demand to allow him/her to inspect and make copies of the protocol of trial. In cases where the criminal defendant is unable to read the protocol of trial, he/she may demand the protocol of trial to be read to him/her (Article 55(1) and (2) of the Criminal Procedure Act). Therefore, if a criminal defendant with visual impairment demands the protocol to be read, the court should grant such request.

### **C. Procedure for the Preservation of Evidence**

Article 41(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes provides that, where any circumstances exist that make it impractical for a victim to appear and give testimony on a trial date, the victim or his/her legal representative or the police may, by explaining the grounds therefor, ask the public prosecutor who investigates the relevant sexual crime to request the preservation of evidence under Article 184 (1) of the Criminal Procedure Act. In such cases, if the victim lacks the ability to discern things or make decisions due to any physical or mental disability, he/she shall be deemed to be under circumstances that make it impractical for him/her to appear and give testimony on the trial date. Based on this Article, Article 3(1) of the Established Rule on Examination of Witness and Protection of Victim in a Sexual Crime Case provides that, when a request for

preservation of evidence is made where a victim falls under Article 30(1) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes (where the victim of a sexual crime is under the age of 19 or lacks the ability to discern things or make decisions due to any physical or mental disability) or Article 26(1) of the Act on the Protection of Children and Youth Against Sex Offences (statements of a victim of a sex offense against a child or youth and the process of investigation shall be recorded with a recording device, such as a video recorder, and preserved), the court should examine such a witness barring special circumstances.

Article 27(3) and (4) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes provides that a victim's counsel may participate in a procedure for the preservation of evidence to state his/her views, and inspect or copy any related document or evidence related to the pending case, after such preservation procedure.

In cases involving crimes other than those involving sexual violence, the evidence preservation procedure under Article 184 of the Criminal Procedure Act may be used for a person with a disability having serious difficulty with appearing on the trial date and making statements because of his/her disability.

## **D. Procedure of Evidence Examination**

### **1) Defendants With Visual Impairment**

A defendant with a visual impairment may fail to fully understand the admitted evidence even with the assistance of defense counsel. Therefore, the presiding judge should use caution when proceeding with such cases.

## A) Documentary Evidence

Article 244 of the Criminal Procedure Act provides that the protocol containing the statement of a suspect should be made available to the suspect for inspection or should be read to him/her. In some cases, the investigation agency may make such protocol available to a suspect with visual impairment without actually reading it to him/her, and have the suspect submit a handwritten statement confirming that he/she has no objection or any other opinion concerning the protocol. Therefore, the court should verify whether the defendant with a visual impairment was able to properly perceive the contents of the protocol, and if not, whether the defendant requested recital and such request was satisfied.

When a defendant with a visual impairment denies the authenticity of the protocol, the public prosecutor may request examination of video-recorded evidence in accordance with Article 312(2) of the Criminal Procedure Act and Article 134-2 of the Regulation on Criminal Procedure. In such case, the presiding judge needs to ensure that the defendant with visual impairment is able to properly listen to the recorded evidence and have what takes place on the screen explained to the defendant in detail.

In addition, when the court examines documentary evidence regarding a defendant with a visual impairment, the court should have the party requesting admission of the evidence recite the evidence in accordance with Article 292(1) and (2) of the Criminal Procedure Act, rather than simply reporting its contents (Article 292(3) of the same Act). If the document to recite is long, the court may choose to convert the document into a format requested by the defendant or to allow the defendant to review the evidence with help from the defense counsel and report the gist of the evidence on the next court date.

## **B) Evidential Material**

Rather than having evidential material simply presented in the courtroom (Article 292-2 of the Criminal Procedure Act), the court should describe the form and shape of the evidential material in detail so that the defendant with visual impairment may understand what it is. Depending on the grade of visual impairment, such evidence may be presented to the defendant using the magnifying function of the projector in the courtroom.

In cases where an object carried by a defendant with visual impairment was seized and presented as evidence, the court needs to verify how the seizure or search warrant was presented (in particular, whether it was presented in a way that the defendant can perceive, such as through reading the warrant to the defendant). A warrant of search and seizure must be presented to a person subject to a disposition, according to Article 118 of the Criminal Procedure Act. If the suspect is a person with visual impairment who cannot read the warrant presented, simply showing the warrant hardly constitutes due process.

## **C) Inspection and Copying of Evidence**

When a defendant with visual impairment or his/her defense counsel requests the copying or inspection of evidence in accordance with Article 35 of the Criminal Procedure Act after the prosecutor submitted the evidence, and the defendant or the defense counsel also requests the conversion of the evidence into a format perceivable by the defendant, the question is which institution is responsible for performing such conversion.

If we consider the fact that the court keeps the evidence submitted to it, and the request for inspection and copying is filed with the court, the court is responsible for converting the evidence into a format that is understandable to the defendant. When a defendant or defense counsel

requests the provision of documents prepared by the investigation agency in the form of electronic files, it is difficult for a court to respond to such request because it does not keep electronic files of documents prepared by investigation agencies (and such files cannot be admitted as evidence, unless the files themselves are submitted as evidence). However, the presiding judge may ask for the prosecutor's cooperation to acquire and provide read-only files of such documents. Based on the special needs of defendants with visual impairment, and Article 266(3) and (4) of the Criminal Procedure Act, some argue that the presiding judge may order the prosecutor to provide the defendant with electronic files, etc., of evidence created by the investigation agency. When the prosecutor does not cooperate, and the court finds it inappropriate to create electronic files of documents prepared by the investigation agency, the court needs to take such measures as requiring the defendant or the defense counsel to convert such documents into a format other than electronic file, or to have the defendant access the contents of such documents with the assistance of the defense counsel.

## **2) Defendants With Hearing Impairment**

Documentary evidence is typically examined by the party requesting the admission of such evidence by reciting the document. In cases where the defendant is a literate person with a hearing impairment, the court may examine the evidence by notifying the defendant of the summary of the document using sign language or written interpretation, and presenting the document for inspection (Article 292 of the Criminal Procedure Act).

Under the Criminal Procedure Act, documentary evidence is typically examined by the party requesting the admission of such evidence by reciting the document. In cases where the defendant with a hearing or speech impairment is illiterate, the court may notify them of the gist of documentary

evidence through sign language interpretation, and in some cases, it may be useful for a hearing-impaired sign language interpreter to provide additional interpretation. Also, where the defendant with a hearing impairment is literate, evidence may be examined through inspection by conveying the gist of the documentary evidence to the defendant in their preferred method (between written interpretation and sign language interpretation) and presenting the documentary evidence (Article 292 of the Criminal Procedure Act).

### 3) Defendants With Mental Disabilities

Article 318(1) of the Criminal Procedure Act provides that documents or articles on which the criminal defendant agrees shall be admissible as evidence when deemed to be genuine. This provision is an exception to the hearsay rule, which makes a document or an article admissible if the defendant waives the right to cross-examination; therefore, the provision presupposes that the defendant understands the meaning of cross-examination. When a defendant with a developmental disability expresses his/her consent to the admission of evidence, the court should make sure that the defendant understands the significance of such admission. Since some people with mental disabilities suffer a deterioration in cognitive capacity due to a long history of taking medication for mental illness, it may be necessary to confirm whether they clearly understand the meaning of consenting to the admission of evidence.

## E. Defendant Examination

When the presiding judge or a judge examines a criminal defendant, he/she may allow a person who has a reliable relationship with the criminal

defendant to sit in company with the criminal defendant, ex officio or upon request of the criminal defendant, his/her legal representative, or the prosecutor, if the criminal defendant lacks the ability to discern right from wrong or make and communicate a decision due to a physical disability or mental disorder, or if it is necessary for facilitating the criminal defendant's psychological stability and smooth communications in light of his/her age, gender, nationality, or any other factor (Article 276-2(1)1 and 2 of the Criminal Procedure Act). A person in a reliable relationship who may accompany a defendant refers to the spouse, lineal relatives, siblings, family member, cohabitant, employer, and other person who may help with the psychological stability and smooth communication of the defendant. A person in a reliable relationship with the defendant and accompanying the defendant may not impede the progress of judgment; if he/she unfairly impedes the progress of judgment, the presiding judge may suspend the accompaniment (Article 126-2 of the Regulation on Criminal Procedure).

Furthermore, when a person has a disability but is capable of discerning right from wrong or making/communicating decisions, the court needs to allow a person in a reliable relationship with the defendant to accompany him/her if it is deemed necessary for psychological stability and smooth communication based on Articles 4(1)5, 20(2), and 26(6) of the Act on Prohibition Against Persons With Disabilities. In such cases, however, the presiding judge should control intervention by such person so that it is not excessive.

The presiding judge should ensure that the defendant is examined based on the physical and mental considerations for the person with a disability (refer to page 97).

## F. Examination of Witnesses With Disabilities

### 1) Witness Supporter

Article 32 of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes defines that, each level of court shall have appropriate facilities for protecting and assisting victims, etc. so as to keep any victim, etc. appearing in court as a witness from encountering the accused or his/her family before or after trial, and each level of court shall have employees who will take charge of the management and operation of such facilities and the protection of and provision of assistance to victims, etc. (witness assistance officers).

In addition, Article 84-10 of the Regulation on Criminal Procedure provides that a court should, barring special circumstances, set up appropriate facilities for protection and support, as well as appoint staff members in charge of managing the facilities and victim protection and support. This provision is a general provision that provides for the appointment of witness supporters for all crimes, including crimes involving sexual violence. Witness protection and support are of paramount importance when the witness is a person with a disability. The presiding judge should actively utilize the witness support facilities and staff members to ensure psychological stability or smooth examination, insofar as the circumstances of the specific court allow for the use of such facilities or the appointment of its staff as a witness supporter.<sup>35)</sup>

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35) Regulation on Hearing, Trial, and Victim Protection for Sexual Crime Cases

Article 15 (Responsibilities) (1) Witness supporters shall perform the following responsibilities:

1. Trial proceedings, structure, and seat arrangement of the courtroom, meaning of examination of a witness and its order and method, method and procedure of testimony and expression of opinion of victim, procedures for requesting issuance of certified copy of court record;
2. Counseling for a witness' psychological stability before and after examination;
3. Proper management and operation of the witness support facilities;



## 2) Sitting With Person in a Reliable Relationship

When a court has a victim of a crime sit in the witness box for examination, the court may, if deemed that the victim is likely to feel severe uneasiness or tension in light of the age of the witness, his/her physical or mental state, or any other circumstances, allow a person who has a reliable relationship with the victim to sit in company with the victim, ex officio or upon a motion of the victim, his/her legal representative, or the prosecutor (Article 163-2(1) of the Criminal Procedure Act). In addition, if a victim of a crime is less than 13 years of age or incompetent to discern right from wrong or make a decision due to his/her physical or mental disability, the court should allow a person who has a reliable relation with the victim to sit in company with the victim, unless such company is likely to cause a trouble in the proceedings or there is any inevitable reason otherwise (Article 163-2(2) of the Criminal Procedure Act).

Therefore, when a victim has a disability but is capable of discerning right from wrong or making/communicating decisions, the court needs to allow a person in a reliable relationship with the witness to accompany a victim in accordance with Article 163-2(1) of the Criminal Procedure Act if the court determines based on his/her physical and mental state that he/she may feel serious nervousness or stress. A person in a reliable relationship refers to the spouse, lineal relatives, siblings, family member, cohabitant, employer, and other person who may help with psychological stability and smooth communications of the victim. Where a person in a reliable relationship unfairly impedes the progress of judgment, the presiding judge may suspend the accompaniment (Article 84-3(1) and (3) of the Regulation

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4. Provision of information on the progress of the trial under an order of the presiding judge caused at the request of victim's witness; or
  5. Other responsibilities to be performed by witness supporters so determined by chief justices after deliberation of the witness support committee as necessary for protection and support for witnesses.

on Criminal Procedure).

The Criminal Procedure Act allows only a person in a reliable relationship with a witness who is also a victim to sit with the witness. However, based on Articles 4(1)5 and 20(2) of the Act on the Prohibition of Discrimination against Persons With Disabilities, the court may allow a person in a reliable relationship to sit with a witness who is not a victim with the consent of the prosecutor and the defendant, if the witness has difficulty making statements because of his/her disability.

In such cases, the presiding judge needs to facilitate the examination process by having a court official inform a witness with a disability that they may be accompanied with a person with whom they are in a reliable relationship when summoning the witness using appropriate means such as telephone.

### **3) Witness Oath and Provision of Signature or Seal Impression**

If the witness is not able to read or sign the written oath, court officials who participate in the trial may act for the witness (Article 157(3) of the Criminal Procedure Act). A person with a hearing impairment may take the oath using sign language while looking at the written oath, which is to be interpreted by the sign language interpreter. If the person with hearing impairment is illiterate, the court may follow the same procedure, except that the court informs the person that he/she will take the oath by repeating after the sign language interpreter interpreting the written oath using sign language.

Any witness who is under 16 years of age or who cannot understand the meaning of an oath shall be examined without being sworn (Article 159 of the Criminal Procedure Act). Therefore, the court should verify whether a witness understands the purpose of the oath when examining a witness

with a developmental disability. A witness with a mental disability may suffer a deterioration of cognitive capacity due an extended history of taking medication for mental illness. In such cases, it may be required to verify whether the witness understands the purpose of the oath.

#### **4) Examination of a Witness Using Video or Transmission System**

According to Article 165-2(1) 3 of the Criminal Procedure Act, when examining a person who is deemed likely to lose peace of mind substantially due to psychological burden when the person testifies in confrontation with a criminal defendant or any other person, in light of the nature of the crime involved, the age of the witness, his/her physical or mental state, the relation with the criminal defendant, or any other circumstances, the court may examine the person through a video or any other transmission system. Therefore, the court needs to decide whether to use the means prescribed by Article 165-2 above by looking into the witness' mental state, etc.

#### **5) Cautionary Notes for Each Disability Type**

##### **A) Witness With Visual Impairment**

In cases where a witness has been confirmed to be a person with visual impairment, the presiding judge needs to ensure that the witness appears at the court on the set date by having a court official make a phone call or send an e-mail when serving the witness with the summons.

When the examination involves a document or an article, such document or article needs to be explained to the witness by the examiner. In addition, the presiding judge should take appropriate measures when such explanation is erroneous.

When a witness with visual impairment requests inspection or

copying of the protocol of the examination of a witness under Article 84-2 of the Regulation on Criminal Procedure, the court should provide such witness with aversion of the protocol converted into a format that can be understood by the witness, as well as the certified copy of the document so that the witness may verify whether the converted document is identical to the original. Because a protocol of the examination of a witness is a document that is electronically generated and kept by the court, the court may provide a protocol in an appropriate format such as a read-only HWP (Hancom Office) file.

## **B) Witness With Mental Disability**

### **(1) Provision of Sufficient Time**

The court should allow sufficient time when examining a witness with a mental disability, considering the possible pressure and stress felt by a person with a mental disability during examination. It may take a longer time to examine a witness with a developmental disability, due to the need to utilize a person related to the person with a disability, a person in reliable relationship, etc. to help the witness communicate and understand the judicial proceedings in plain language. The court should allow frequent rest for a person with a mental disability who loses his/her concentration. Such person may need separate assistance for communication, as his/her cognitive capacity is deteriorated or he/she experiences speech impairment due to taking medication for mental illness for an extended period. Also, such person may experience difficulty with speaking at a fast pace. Therefore, the court should patiently wait for such person to begin his/her speech, without urging them to speak more quickly. In addition, sufficient time for hydration and medication should be allowed as necessary.

## (2) Guideline on Examination of a Witness

Examination of a person with a developmental disability should be conducted using plain language, refraining from the use of technical legal terms. When the witness does not understand something, an explanation should be repeated until the witness understands it. In addition, the judge should not speak fast or urge the person with a disability to speak faster. When asked a vague or complicated question, a person with a mental disability may panic, which is likely to result in an inaccurate statement, such as unconditionally agreeing to what the presiding judge says.

If a person with a mental disability is examined in a long and complicated way, he/she may be apt to become confused. Thus, questions shall be short, direct and as simple as possible.

### How to Ask Questions to a Person With Mental Disability<sup>36)</sup>

#### Principles

- ① Use words that clearly convey the intended meaning, speak slowly, and use short sentences.
- ② Before going into the main questions for the examination, first verify the level of mental development by, for example, asking questions to assess the person's understanding of numbers, time, seasons, causality, and sequence to adjust the examination accordingly.
- ③ When providing complicated information, divide such information into smaller parts to convey the meaning.
- ④ If possible, use figures or gestures to convey the intended meaning in a way that is easily comprehensible.
- ⑤ Use proper nouns rather than pronouns or terms used in the courtroom (for example, refer to each person by his/her name, rather than using terms

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36) Here, the term "person with mental disability" refers mainly to a person with a developmental disability.

such as plaintiff, defendant, and witness).

- ⑥ Ask open-ended questions first to elicit voluntary statements from the witness, and later draw out more specific statements by asking questions based on the initial statement. Avoid “yes/no” questions and leading questions.
- ⑦ Avoid asking multiple-choice questions as much as possible. If such type of question is necessary, mix them with open-ended questions (for example, asking “whether the witness witnessed the incident in the morning, in the evening, or another time of the day”).
- ⑧ If necessary, convey information repeatedly using different words or means of communication, taking care not to change the words that the person with a disability is already using.

### **I Appropriate Questions<sup>37)</sup>**

- ① General question
  - Can you tell us what happened, slowly?
  - (If the witness reported more than one occurrence) Can you tell us what happened most recently?
- ② Follow-up question
  - Then what happened?
  - You said “then...” Can you be more specific?
- ③ Refocusing question
  - (After suggesting a word regarding the victim’s age or season to remind him/her of the time) Let’s go back to that point. Can you tell us what happened, as you remember it?
- ④ Clue-suggesting question
  - (If the victim testified that “○ touched me”) You told us that ○ touched your △.  
Can you tell us what happened?
  - (If the victim mentioned that the defendant “said something scary”) You told us that ○ said something scary. Can you tell us what he/she said?

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37) The following guidelines are for questioning a child, but have been adapted to suit people with a mental disability.

## Inappropriate Questions<sup>38)</sup>

- ① Questions that make assumptions not included in the statement or go ahead of the victim's statements, or questions that presuppose a certain answer
  - When ○ touched your △, was your mother nearby?  
(Assuming that the defendant "touched" the victim although the victim only stated that the defendant "kissed" the victim, or trying to confirm that the defendant "touched" the victim when the victim's statement progressed only to the point where the victim met the defendant)
- ② Questions that offer incomplete choices
  - Victim: We lay on the sofa.
  - Examiner: Did ○ lie on top of △, or △ lie on top of ○?
- ③ Questions that contain adversarial remarks or that contest the credibility of the statement itself
  - Are you sure it really happened?
  - You just told us that ○ took △ to his/her house, but △ told us otherwise.
- ④ Questions that cause confusion in the victim's memory
  - Are you saying that the person told you to follow him/her from the "grocery store in front of the house?"  
(If the victim stated that "I met the person at the store in front of the house, and the person told me that he/she would buy me something if I followed him/her," changing the "store" into the "grocery store" may confuse the victim's memory, changing his/her yes or no answer)

## Different Types of Questions

- ① - Was △ on ○'s bed? : suggestive questions, such as the one mentioned, are not appropriate.
  - You told us that △ was in ○'s bedroom. Can you tell us more about what happened in the bedroom?: appropriate
- ② - You told us that ○ kissed △. Did ○ kiss △ on the lips? : questions that offer incomplete choices, such as the one mentioned, are not appropriate
  - You told us that ○ kissed △. Can you tell us more about that kiss?: appropriate

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38) The following guidelines are for questioning a child, but have been adapted to suit people with a developmental disability.

### **(3) Use of Auxiliary Equipment**

Picture cards, dolls, or other auxiliary equipment can be used to communicate with a person with a developmental disability. However, using cards that are unfamiliar to the witness may distort the true intention of the person with a disability. The court needs to allow the use of picture cards or dolls that are familiar to the witness.<sup>39)</sup>

### **(4) Expert Opinion**

The court may seek opinions from any psychiatrist, psychologist, social welfare scholar, and other related professionals regarding the mental and psychological state of any offender or any victim, the outcome of their diagnosis, and the details of a statement made by the victim. In addition, the court should seek such opinions if the victim is under 13 years of age or is incompetent to discern right from wrong or make decisions because of his/her physical or mental disability (Articles 33(1) and a proviso to Article 33(4) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes).

If the victim is a person with a mental disability, the court may need to seek expert opinions regarding the victim's mental state and characteristics of his/her statement because of his/her disability.

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<sup>39)</sup> The guidelines for using picture cards are as follows:

- ① Cards should be simple. Cards with facial expressions or that are familiar to the person with a disability are preferable.
- ② At least 30 types of cards are required for communication assistance purposes.
- ③ Not all cards are useful. Some cards do not have a specific meaning, which may render the statement vague. In some cases, the witness may not understand the picture itself.
- ④ Picture cards are only auxiliary equipment. Appropriate use of a communication assistant is of the highest importance.



## **(5) Right of Victims With Disabilities to Make Statements**

Article 294-2 (Right of Victim to Make Statements) of the Criminal Procedure Act stipulates that “upon receipt of a petition from a victim of a crime, the court shall admit such victim as witness for examination. Whenever the court examines a victim pursuant to paragraph 1, it shall give the victim an opportunity to make a statement on the degree and result of damage, his/her opinion concerning punishment of the criminal defendant, and other matters relating to the relevant case (paragraph2).” This provision prescribes the victim’s right to make statements, which is guaranteed by Article 27(5) of the Constitution. However, an issue has continued to be raised as to the fact that the procedural laws materialize the same right through the “witness examination.” And Article 134-10 (Statement of Opinion of Victim, etc.) of the Regulation on Criminal Procedure newly inserted a provision to the effect that “where it is recognized as necessary, the court may, ex officio or upon request of victim, etc. (hereinafter in this Article and Article 134-11 referred to as “victim, etc.”) provided by Article 294-2(1) of the Act, have the victim, etc. appear on the trial date and state their opinion not by examining witnesses on matters that are stipulated by Article 294-2(2) of the Act and fall under the admission of facts of crime.”

Where a witness is not examined properly in light of the details of case, the degree of investigation by the investigative institution, the type or characteristics of the disability, etc., it is required to guarantee the right of the victim, etc. to make statements under the Regulation on Criminal Procedure. This will supplement the damage assessment, damage recovery, etc., where they are not sufficiently justified due to circumstances of the victim, etc. Thus, the court may direct litigation so that this may be used well in practice.

## **G. Inspection or Copying of Litigation Record by Victim**

According to Article 294-4 of the Criminal Procedure Act, a victim of a case pending in a court, the legal representative of the victim, or the attorney-at-law may file an application for inspection or copying of the records of trial with the presiding judge. If it is deemed necessary for the victim's remedies or if there is any other good cause, and if it is appropriate in light of the nature of the crime involved, the status of the trial, and other circumstances, the presiding judge may permit the victim to inspect or copy the litigation record. When permitting inspection or copying of the litigation record by a victim with a disability, the court needs to convert the record into a format that can be understood by the victim.

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## 5 Participatory Trial

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### A. Defendants With Disabilities

A court shall inquire a defendant, in writing or by other means without exception, of whether he/she desires a participatory trial (Article 8(1) of the Act on Citizen Participation in Criminal Trials). For such inquiry, the court should serve the defense counsel or the defendant with the Guide on Participatory Trial explaining the process of the participatory trial, the submission of documents under Article 8(2) of the same Act, the restriction of withdrawal under Article 8(4) of the same Act, and other cautionary notes (Article 3(1) of the Regulation on Citizen Participation in Criminal Trials).

If the defendant was tried through regular criminal proceedings without being asked whether he/she wants a participatory trial, this constitutes a serious breach of his/her right to a participatory trial, which renders the procedure illegal and nullifies the procedural acts conducted during the relevant proceedings (Supreme Court Decision 2012Do1225 of April 26, 2012).

However, a defendant with a disability may fail to grasp the meaning of the Guide on Participatory Trial that has been delivered to him/her. Therefore, the presiding judge should inform the defendant of the purpose and details of the participatory trials on the first trial date (or the first trial preparation date), determine the defendant's will, and indicate the defendant's answer in the protocol. If it is difficult to properly verify the defendant's intention regarding participatory trials due to a failure to provide the defendant with judicial assistance on the first trial date (or the first trial preparation date), the court shall have the defendant apply for judicial assistance by informing him/

her, on the first trial date (or the first trial preparation date), of the fact that he/she may apply for the judicial assistance, and then specify the purpose of application, etc. in the protocol. In light of the period required to provide judicial assistance, the following shall take place: the next trial date shall be designated; the defendant shall be informed of the purpose and details of participatory trials in a state where the defendant is provided with judicial assistance and thus can communicate; the defendant's intention shall be verified.

Other guidelines on judicial assistance and cautionary notes of the regular trial all apply to participatory trials.

## **B. Juror Candidates With Disabilities**

### **1) Before Juror Selection Date**

In participatory trials, the court sends the selection date notice and questionnaire to juror candidates, and each candidate fills in the questionnaire before submitting it to the court. The selection date notice and questionnaire, etc. currently sent to juror candidates do not contain a barcode for voice conversion. Thus, it is necessary to ensure that people with a visual impairment are not excluded from the preparation of the questionnaire by printing the barcode on the above documents. Also, juror candidates shall, by being sent the Guide on Judicial Assistance for People With Disabilities with the above documents, be informed of the fact that they can receive judicial assistance and be provided with convenience from the selection date by applying for the judicial assistance before the selection date. If the fact that a juror candidate has a disability is verified on the selection date, the proceedings might be delayed until the necessary judicial assistance is

provided. Specifically, a number of juror candidates will appear on the selection date. If the selection date is designated again for judicial assistance, they shall go home and appear again on the newly designated selection date. Otherwise, the selection is conducted in a state where judicial assistance is insufficient or not provided at all, meaning the juror candidate with a disability will be partly or fully excluded from the trial. Thus, for participatory trials, the guide on judicial assistance and application therefor must be able to be completed before the selection date to prevent the proceedings from being delayed. When there is a person with a disability among the candidates according to the submitted questionnaires, the presiding judge should have a court official contact the candidate with a disability and check the assistance required on the jury selection date. In addition, the presiding judge should notify the public prosecutor and the defense counsel that there is a person with a disability among the juror candidates, and allow them sufficient time to prepare the documents and materials in a format that can be understood by that candidate.

## 2) Juror Selection Date

When there is a person with a disability among the juror candidates, the presiding judge should confirm the assistance required before the jury selection date. If that candidate is a person with a hearing impairment, such person needs sign language interpretation or written interpretation starting from the jury selection date.

During jury selection involving a candidate with a disability, the presiding judge must not rush to the conclusion that the candidate with a disability is “a person who has difficulties in performing duties as a juror due to any other unavoidable cause or event” under Subparagraph 7 of Article 20 of the Act on Citizen Participation in Criminal Trials. Such conclusion would

cause the exclusion of such person from the trial solely based on his/her disability. However, when a candidate with a disability expresses his/her wish to be exempted from the jury duty, the judge may grant an exemption based on the specific circumstances.<sup>40)</sup> In addition, if a prosecutor's or defense counsel's challenge to a candidate is solely based on his/her disability, and there is no other circumstance that justifies such challenge, the presiding judge should carefully decide whether to reject the challenge, considering the purpose of the Act on the Prohibition of Discrimination Against Persons With Disabilities.

### 3) Trial Date

#### A) Necessity of Judicial Assistance

Pleadings in the courtroom should be made oral (Article 275-3 of the Criminal Procedure Act). The presiding judge should, upon the closing of pleadings and arguments, explain to jurors in the court the essential points of the prosecuted facts, the applicable provisions of Acts, the essential points of pleadings and arguments of the defendant and defense counsel, the admissibility of evidence, and other significant matters (Article 46(1) of the Act on Citizen Participation in Criminal Trials). Therefore, a juror with a hearing impairment or speech impediment requires judicial assistance equivalent to that provided to defendants with such disability. In particular, the presiding judge should provide sufficient time to facilitate interpretation for the relevant juror.

In addition, the presiding judge should have the prosecutor and the

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40) Article 20 of the Act on Citizen Participation in Criminal Trials stipulates that the court may at its discretion exempt a "person who has difficulties in making an appearance before the court due to disabilities" from the performance of duties as a juror. However, it could fall within a discretionary act under the Act on the Prohibition of Discrimination Against Persons With Disabilities to exempt people with disabilities from duties as a juror. Thus, attention shall be paid thereto.

defense counsel convert materials to use on the trial date into a format that is understandable by a juror with visual impairment, while allowing sufficient time for such conversion, or if required, providing the relevant facilities held by the court.

Jurors with a physical disability or a brain lesion disability shall be permitted to sit with their assistant and provided access to juror seats. If a juror needs to take a rest due to his/her physical disability, etc., he/she shall be provided with frequent resting time during the proceedings (for details, refer to the judicial assistance for the defendant with a disability examined above).

### **B) People Related to the People With Disabilities and Assistants**

Under Articles 4(1)5 and 20(2) of the Act on the Prohibition of Discrimination Against Persons With Disabilities, the court should not exclude from proceedings a person related to the person with a disability who is accompanying him/her for communication assistance such as sign language interpretation, braille conversion, reading, ghostwriting, or direction, without justifiable grounds. In addition, if a juror with a disability who evidently requires communication assistance is not accompanied by a related person, the court needs to appoint a court employee as a communication assistant.

If, on the trial date, materials converted for a juror with a visual impairment are not available, the presiding judge should have a person related to the person with a disability or a court employee read, describe, or explain the materials for the juror. For visual materials with high significance (main evidentiary documentary or video evidence, etc.), the litigants with the case (defendant, defense counsel, or prosecutor) should be allowed to verify the objectiveness and accuracy of such description or explanation and state

their opinions.

However, because a person related to the person with a disability or an assistant should not go beyond the boundary of their roles as such person or assistant, the presiding judge should stop such person if he/she attempts to unduly interfere with the juror's performance of his/her duties, or engages in actions that might undermine the fairness of the proceedings. Furthermore, if the defendant, defense counsel, or prosecutor expresses an objection regarding the fairness and objectivity of a person related with the person with a disability, the presiding judge should stop the involvement of such person and should instead designate a court staff member to assist with communication.

### **C) Deliberation**

During deliberation, the judge or other litigants in the case cannot continuously verify the appropriateness of the performance of a person related to the person with a disability. The presiding judge should inform the assistant, person related to people with disabilities, sign language interpreter, etc. of the fact that they may not intervene in deliberation, and they should only provide assistance with the juror's performance as a juror. Other jurors shall be informed in advance of the role and limitations of an assistant, a person related to the person with a disability, a sign language interpreter, etc. so that they do not misunderstand the opinion of the related person as the opinion of the juror with a disability.

In addition, in accordance with Articles 41(2) and (3) of the Regulation on Citizen Participation in Criminal Trials, during deliberation the jurors may request copies of the written indictment, the presiding judge's explanation, or other documentary evidence and articles from the presiding judge. The presiding judge may provide such copies or articles if they are deemed



necessary. When deliberation begins after only one hearing, as is the case in most participatory trials, there may not be sufficient time to convert documentary evidence etc., for a juror with visual impairment. In such cases, the court needs to have a person related to the juror with a disability assist with such juror during deliberation.

## **C. Victims With Disabilities**

Where a victim with a developmental disability is examined, a person in a reliable relationship with the victim is granted an opportunity to present his/her opinion on the general statement or behavioral characteristics of the victim so that jurors can understand the characteristics of the statement or behavior of the victim. (For other judicial assistance for a victim with disability, refer to information regarding a victim with a disability in general trial proceedings.)

## 6 Pronouncement of Judgment

The Criminal Procedure Act only stipulates that a person in a reliable relationship may accompany the defendant with a disability in certain proceedings, such as examination of the defendant, etc. (Article 276-2(1)1 of the Criminal Procedure Act). Also, Articles 20(2), 26(4) and (6) of the Act on the Prohibition of Discrimination Against Persons With Disabilities stipulate the provision of a communication assistant for the people with disabilities. Thus, it is required to guarantee that the defendant may appear even on the date of sentencing accompanied by an assistant, related person, etc. so that the defendant will be accurately delivered the judgment.

The presiding judge may provide the interpreter present with a summary of the court decision immediately before pronouncing its judgment. In addition, the presiding judge needs to explain the text of the judgment to the defendant in plain language if it is expected that the defendant will have difficulty understanding it (Article 15 of the Established Rule on Interpretation). If possible, written interpretation shall be provided in parallel so that the judgment will not be mistranslated. For a defendant with a developmental disability, the judgment shall be prepared in precise language using terms which are easy to understand. Even on the date of sentencing, the reason for and text of the judgment shall be explained in plain language. In particular, the presiding judge needs to explain in detail the text of the judgment and the procedure for appeal.

When setting a pronouncement date for a case in which a person with a disability is the defendant, the court should consider the time required to provide an explanation of the reasons for the judgment and sign language interpretation thereof when setting the time. Where supplementary documents

(Guide on Criminal Indemnity, Guide on Probation, Guide on Institutional Treatment, etc.) are issued with the sentence of judgment to the defendant with a visual impairment, such documents shall, by default, be issued with a barcode for voice conversion. If the defendant with a visual impairment so requests, the standard text file, braille, enlarged document, etc. shall be provided. A defendant with developmental disability shall be issued with supplementary documents (Guide on Criminal Indemnity, Guide on Probation, Guide on Institutional Treatment, etc.) prepared in plain language. If the defendant with disability is taken into the custody of the court on the date of sentencing, it would be advisable to prepare and provide the Guide, etc. for the defendant so that he/she can be informed of the convenience with which the defendant could be provided once behind bars.

Currently, a judgment is provided with a barcode for voice conversion printed thereon. Should a defendant with a visual impairment request a judgment printed in braille, the judgment shall be provided in accordance with the document provision method requested.

## <Annexes>

# Guide and Application

- \_\_\_ [Annex 1] Guide on Judicial Assistance (Convenience Provision) for People With Disabilities
- \_\_\_ [Annex 2] Request for Judicial Assistance (Convenience Provision) for People With Disabilities
- \_\_\_ [Annex 3] Guide on Interpretation Service for People With Disabilities
- \_\_\_ [Annex 4] Interpreter Guide
- \_\_\_ [Annex 5] Request Form for Providing Allowance for Assistant
- \_\_\_ [Annex 6] Guide on Examination of Suspect Before Detention
- \_\_\_ [Annex 7] Guide on Criminal Procedures
- \_\_\_ [Annex 8] Defense Guide for Cases Requiring Interpretation





## Guide on Judicial Assistance (Convenience Provision) for People With Disabilities

The purpose of this Guide is to support the provision of various forms of assistance for people with disabilities participating in court proceedings.

### ● Who is eligible for judicial assistance?

Many people around us suffer from disabilities, such as hearing impairment due to old age, etc. Any person suffering inconvenience due to a disability may be eligible for judicial assistance. This assistance is not restricted to those registered as a person with a disability under the Act on Welfare of Persons With Disabilities. In addition to the parties to court proceedings, such as the plaintiff or the defendant, witnesses, experts, interpreters, etc. can also benefit from judicial assistance.

### ● What types of judicial assistance are available?

You can request judicial assistance that you need to effectively participate in the proceedings. You should request the form of assistance that is most suitable for your needs. The following forms of assistance are available: sign language interpretation, written interpretation, hearing aid, magnifying glass, convertible files, AAC equipment and appliance, assistance with mobility including wheelchair, assistants to help you with your activities and communication, resting time, or other conveniences depending on the type and specifics of your disability.

### ● Where should I file the request?

If you need assistance, you can file a request with the trial bench in charge of your case.

### ● What information should I provide regarding my disability?

You should explain to the court why you need judicial assistance, and what kind of assistance you require. Based on the information you provide, the court will determine whether to provide judicial assistance. The court may ask you to provide documents to prove such disability (copy of person with a disability registration, etc.) or medical records. You should fill out the “Request for Judicial Assistance (Convenience Provision) for People With Disabilities” form (available at the court), and submit it along with a copy of a registration or medical records, if applicable.

### ● Are all requests for judicial assistance accepted?

No, they are not. If the requested assistance would cause too much burden or seriously undermine the court proceedings, the court may not accept the request.



※ When it is necessary to inform the court of your disability, please fill out the questionnaire below and submit it with the Request Form for Judicial Assistance (Convenience Provision) for People With Disabilities. Please answer only the questions related to your specific type of disability.

### [Visual Impairment]

**A. If you have difficulty reading letters or recognizing faces because of visual impairment, please check the sentence that best describes your disability.**

1) I can read letters by holding the paper close to my face or using a magnifying glass. The font size I can read is (      ).

① Court (10p)    ② Court (20p)

③ Court (30p)    ④ Court (40p)

2) I have difficulty reading letters even with auxiliary equipment such as a magnifying glass. However, I can read print with an enlarged font. (      )

3) I can read and understand braille. (      )

4) I have equipment that converts electronic files into voice, or I can easily access such equipment or facilities nearby. (      )

5) Because of my low vision, I need assistance entering and leaving the court building. (      )

6) Other (Please specify other details regarding your disability that you want to tell the court)

### [Hearing Impairment]

**B. If you have difficulty accurately hearing what other people say because of a hearing impairment, please check the sentence that describes your disability.**

1) Although I have difficulty with my hearing in everyday conversation, I can understand what other people say when they are close to me and speaking clearly. I have no difficulty with speaking. (      )

2) Although I have difficulty with my hearing in everyday conversation, I can understand what other people say when I wear a hearing aid. I have no difficulty with speaking. (      )

3) I have difficulty with hearing, but I can understand sign language (      ). I can read letters (      ). I learned oral conversation. I can understand what other people say by reading their lips (      ).

4) I have difficulty with speaking, but I can use sign language (      ). I can communicate by writing (      ). I am comfortable using a keyboard (      ).

5) I feel most comfortable communicating with sign language. (      ) I feel most comfortable communicating with text. (      ) I need both of them. (      )

6) Other (Please specify other details regarding your disability that you want to tell the court)



## **[Physical Disability]**

**C. If you have physical difficulty participating in the proceedings, please check the sentence that best describes your disability.**

- 1) Although I have difficulty moving because of my disability, I can move around with ease with a little help from people around me because I carry an auxiliary device such as a wheelchair or a crutch. ( )
- 2) I have difficulty with moving because of my disability, and I don't have an auxiliary device. I need the court to provide me with an auxiliary device such as a wheelchair or crutch. (Please specify the type of equipment you need here)
- 3) I have difficulty moving because of my disability, and I need an assistant to help me move around. (Please specify the type of assistance you need here. For example, you may write that you have a wheelchair but you need someone to push it for you.)
- 4) Because of my physical condition, I have difficulty sitting through a long procedure. I need a place to rest if the procedure takes a long time. (Please specify your physical condition here)
- 5) Because of my physical condition, I have difficulty with expressing my thoughts. I need an assistant to help me express myself. (Please specify whether you can bring your own assistant, and if so, who that assistant is.)

## **[Other]**

**D. If you have any physical or mental difficulty with participating in the proceedings other than those explained above, please specify such difficulty and the convenience provision service for people with disabilities that you want the court to provide to you.**



# Interpreter Guide

Thank you for agreeing to participate as an interpreter. The following are the guidelines provided for your interpretation work in the courtroom.

## 1. General

### **A. You should perform your interpretation with due diligence and according to your conscience.**

An interpreter should take the oath above before performing interpretation. This oath is required by the law for the purpose of realizing judicial justice. False interpretation may be subject to punishment.

### **B. You should remain fair.**

Court proceedings should be fair, and also must be seen to be fair, which means the interpreter should not engage in actions that may cause suspicion. A party with a disability may ask an interpreter to provide legal advice outside the proceedings. If you comply with such request and tell the party the odds of winning or the procedures to follow, this may affect the party. Other than interpretation, do not explain any matters relating to the trial to the party.

### **C. You should not disclose secrets that you acquire in the course of performing your duty.**

An interpreter may receive documents related with the case, and hear various aspects of the case during the hearing. You should not disclose any secrets that you acquire in the course of performing your duty.

## 2. Pretrial Preparation

### **A. The court may provide you with a copy of the written complaint or examination questions in advance, to ensure accurate interpretation and smooth proceedings.**

**You should take care not to disclose such information to any litigant, witness, or third party.**

### **B. If you have no experience with interpretation in a courtroom (experience with interpretation for a civil case, in particular), you can prepare yourself by sitting as a spectator in another case, or familiarizing yourself with legal terms through the Supreme Court's home page and other sources.**

### 3. Interpretation on Court Date

#### **A. You should faithfully interpret what the speaker (a party with a disability or a witness with a disability) says.**

In court proceedings, questions and answers regarding the same matter may be repeated numerous times. For each question and answer, you should fully interpret what the speakers say, paying attention to the nuances and details of each question. You may not omit a part of a statement, or summarize a statement on your own. You may need to take memos of what is being said to ensure accurate interpretation. In addition, you should use direct speech (“It is...”), not indirect speech (“He says it is...”).

#### **B. When you do not understand a question or answer**

In a case involving an interpreter, the presiding judge, the parties, and the attorneys will try to make their questions simple. However, you may have difficulty with interpretation because of multiple questions being asked at the same time, complicated questions, or sentences that are difficult to understand. You may find the voice of a party or witness too low, or their speech too fast to understand. When this happens, you should notify the presiding judge so that you can fully understand the question or answer. If you do not understand what is being said, you should ask the presiding judge to have the speaker repeat the question or answer.

#### **C When a party or witness does not understand the question or answer**

Even if a party with a disability or a witness with a disability provides his/her answer without fully understanding your interpretation, you should not change his/her answer to fit the original question. You should interpret what the party or witness said as he/she said it, and notify the presiding judge that the witness or party may not have understood the purpose of the question. Afterward, the presiding judge may rephrase the question in a more comprehensible format, or have the speaker rephrase the question. Misunderstanding on the part of the questioner or on the part of the answerer may seriously interfere with the fairness of the proceedings.

#### **D. You should interpret the overall proceedings.**

When interpreting for a party or a witness with a hearing impairment, the interpreter should interpret not only the examination but also the overall proceedings, including the remarks from the presiding judge or attorneys on both sides.

## Request Form for Providing Allowance for Assistant

To : Person in charge of  
financial affairs Case No. :  
Date of participation : . . . . . :

Please pay to ○○○, who assisted ○○○ (the plaintiff, the defendant, a witness) in the above case KRW ○○○ thousand as the allowance for acting as an assistant for the socially disadvantaged.

Bank	Account No.	Account holder	Remarks

※ If the provided Account No. does not belong to the assistant, please specify the reasons therefor in the Remarks.

Attachment : 1 copy of assistant's ID

20 . . . . .

Judge, ○○○, ○Division of ○○○Court (Sign or Seal)

### Confirmation

Herein, I confirm that I am not a recipient of activity support allowance or other similar allowance under the Act on Welfare of Persons With Disabilities, or other similar laws and regulations.

20 . . . . .

○○○, Recipient of Judicial Assistance (Sign or Seal)

# Guide on Examination of Suspect Before Detention

## 1. What is an examination of the suspect before detention?

- When an investigation agency seeks to detain you, you have the opportunity to defend yourself in front of a judge. This procedure is called an “examination of the suspect before detention.”
- This gives you an opportunity to explain yourself in front of the judge before the judge decides whether to issue a warrant against you.

## 2. Measures taken upon issuance of warrant of detention

- Even if you are issued a warrant of detention, you may have to ask the court to determine whether such detention is justified (hereinafter referred to as “review of legality of detention”). If the court determines that you should be released, you will be released without delay.
- Persons who can request a review of the legality of your detention include yourself, your defense counsel, your spouse, lineal relative, sibling, family, cohabitant, or employer.
- You can apply for a review of the legality of your detention by having one of the persons above submit a request form to the court, or by submitting such form yourself to the warden or head of the detention center.

## 3. Cautionary note in case of dismissal of warrant of detention

- You will be released without delay if the warrant of detention is not issued.
- However, this is not the end of the overall procedure.
- After release, you should report any change your address or your telephone number to an investigation agency or the court, until the overall proceedings are concluded.
- If you fail to make such report, the court may not be able to contact you to inform you of the subsequent procedures. If you fail to appear at an institution agency or the court on the set date, you may be issued another warrant of detention.
- In some cases, another warrant of detention against you may be requested after additional investigation, etc.



## Guide on Criminal Procedures

### 1. Written indictment and request for public defender

- You have been indicted, and a criminal trial against you has begun. The enclosed document is a duplicate copy of the written indictment.
- You have the right to seek help from a public defender for free provided that you meet the requirements under the law. If you want the help of a public defender, you can fill out the Public Defender Request Form (available at the court) and submit it to the court. If you are currently in detention, you can submit the form to the official in charge at the prison or detention center.

### 2. Summary of court proceedings

- The presiding judge asks whether you are present. This is followed by an opening statement from you or your defense counsel regarding the indicted facts, and then proceeds to evidence examination.
- After questioning, the court hears the prosecutor and the counsel's opinions, and hears your opinion, followed by the court judgment. The proceedings above may be complete within the day, or performed over the course of few days on other court dates.

### 3. Right to motion for release on bail

- When the trial is ongoing while you are detained, you can request the court to release you under certain conditions. This request is called a motion for release on bail.
- The bench will decide whether to release you based on the motive and nature of crime, settlement with the victim, circumstances after the crime and other factors. As for the conditions, the bench may require you to pay a certain amount of money or provide a certain collateral, submit a written pledge, or satisfy other conditions to ensure your presence.
- Even if you are released on bail, it does not mean the end of the trial. It only means that you are now being tried without detention. Thus, you shall appear in the court on the next trial date as scheduled.

### 4. Motion for admission of evidence by the defendant

- If you find the facts indicated in the written indictment different from the actual facts, you may request a witness or submit evidence that is favorable to you.
- Even if you have admitted to all facts of the crime, you can still request a witness or submit evidence favorable to you.

## 5. Right to file an appeal against the court judgment

- If you object to the court's decision, you can file an appeal to request a higher court to reconsider your case.
- An appeal should be filed within one week from the date of pronouncement of the original judgment. You can file an appeal with the court in charge of the original trial, or with the official in charge of the prison or the detention center.





# Defense Guide for Cases Requiring Interpretation

## 1. Visit with the defendant and accompaniment of an interpreter

- A. A defense counsel may visit the defendant accompanying an interpreter of his/her own choosing, or an interpreter designated by the court.
- B. When visiting the defendant with a sign language interpreter at a detention center, etc., the head of the center may require the certification of the accompanying interpreter. A court-designated sign language interpreter may have an interpreter certificate issued. You can file a request with the court.
- C. When asking a court-designated interpreter to accompany you, please contact the interpreter yourself. Please do not allow the defendant or other litigants to personally contact the designated interpreter. You may not disclose the name and contact information of the designated interpreter to the defendant, etc.

## 2. Preparation for a public defender and reimbursement of related expenses

- A. When a public defender requests a designated interpreter to accompany him/her for a visit with the defendant, the court provides the interpreter with remuneration and travel expense within the scope deemed necessary for public defense. If you are not sure whether a certain item is deemed necessary for public defense, please contact the court.
- B. When a public defender accompanies an interpreter appointed by him/herself to a visit with the defendant, the public defender is responsible for reimbursing the interpreter for the expenses incurred by the interpreter. However, the court may provide the public defender with an interpretation fee within the scope deemed necessary for public defense, when providing remuneration for the defender. Therefore, when appointing an interpreter yourself, please contact the court in advance to discuss this issue, and make sure to keep the receipts for interpretation fees, etc., to submit in the future.

## 3. Evidence examination and pleading

For accurate interpretation and smooth proceedings, please clarify your questions and use plain, easy-to-understand expressions. Please prepare a summary of the pleadings in advance for the interpreter.

## 4. For further information, please contact the criminal department of each court (or branch).

<Appendix>

**Cautionary Note on Sign  
Language Interpretation  
and/or Written  
Interpretation in the  
Court**



## Cautionary Note on Sign Language Interpretation and/or Written Interpretation in the Court

### Preliminary Receipt

#### 1. Preliminary receipt employee or bench's staff, etc.

- Where the party, attorney, witness, etc. has a hearing or speech impairment, inform them without delay of the main communication methods, such as sign language, oral conversation, handwriting on paper, etc. and provide the hearing aid, sign language interpretation, written interpretation, etc. necessary for communication. Also, guidance in the procedures for judicial assistance for people with disabilities, such as sign language interpretation, etc. will be provided as well.
- The remote sign language interpretation services of the Relay Call Center may be an option through the Internet ([www.relaycall.or.kr](http://www.relaycall.or.kr)) or mobile phone (107).
- Where preliminary preparations, such as designation of a sign language interpreter, preparation of written interpretation, etc., are required, the presiding judge shall be notified of such fact without delay.

### Designation of Sign Language Interpreter

#### 1. Presiding Judge

- A sign language interpreter is designated from the court's list of sign language interpreters. If there is a person who could better deliver the opinion of a person with a speech impairment (who uses Korean sign language as everyday language) and their neutrality, fairness, etc. can be guaranteed, the person may be designated as a sign language interpreter, even if he/she is not included in the list.
- Where any of the party, attorney, witness, etc. has a speech impairment, a sign language interpreter shall be designated without delay, and it is advisable to notify the person with a speech impairment of such fact no later than 10 days from the date of pleading or the date of trial (including the preparation date).
- However, when the person with a speech impairment receives the notice in advance, he/she may not be able to accurately understand what the notice means due to his/her inability to interpret letters. Thus, it is advisable to confirm, on the first date of meeting the person, whether he/she was notified of the designation of sign language interpretation or whether he/she accurately understood the meaning of such notice. If the person failed to be notified of the designation or understand its meaning, the meaning shall be explained again by the designated sign language interpreter.
- It is advisable to inform, before the hearing, the person with a speech impairment of the fact that he/she may express his/her opinion, such as an objection against the designation

of the sign language interpreter, etc.

- Where the person with a speech impairment requests to change the sign language interpreter, the request may be granted, provided that there are substantial grounds to question the accuracy of interpretation, etc.
- Where a person with a speech impairment is not proficient in sign language or where the accuracy of sign language interpretation is suspect, such as when an objection against the sign language interpretation is raised by the person, etc., it may be considered whether to additionally designate a hearing-impaired sign language interpreter.
- When notifying of the designation of a sign language interpreter, he/she may be informed of the gist and issue of case. Also, he/she may, prior to the hearing, be given a summary and issue of case as long as they are necessary for interpretation.

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## **Trial Date, Pleading Date**

### **1. Presiding Judge**

- The hearing may take a lot of time due to sign language interpretation. Thus, an amount of time equivalent to 3 times that of an ordinary hearing shall be assigned.
- Before the hearing, a person with a speech impairment shall be given an explanation of the communication means that could be provided in parallel, such as sign language interpretation, written interpretation, FM hearing aid, etc. It is advisable to provide written interpretation in parallel with sign language interpretation, unless the person refuses to receive it.
- The speed of pleading shall be adjusted so that sign language interpretation and written interpretation are not disrupted.
- It is advisable to ensure the person with a speech impairment is able to perceive the courtroom situation as people without a disability do, even if the situation is not directly related to the person. All conversation in a courtroom shall be communicated through sign language interpretation, written interpretation, etc.
- Consecutive rather than simultaneous interpretation is recommended for faithful interpretation. Speak one sentence in a concise way, and then wait until the sign language interpreter interprets the sentence in sign language.
- A person with a speech impairment receives substantial information through the shape of mouth, facial expression and gestures of a speaker, even where communication is rendered through sign language interpretation and written interpretation. Thus, when persons related to a case speak, they shall look the person with a speech impairment straight in his/her eyes so that the shape of their mouths and facial expression are visible, and shall speak loudly and slowly with correct pronunciation. In such cases, they shall speak directly to the person with a speech impairment, and shall not speak to the sign language interpreter, or say to the sign language interpreter a phrase such as “please convey that . . .”
- The presiding judge shall inform the sign language interpreter that he/she may ask

questions to him/her within the scope necessary for interpretation. Also, the presiding judge shall answer the questions of a sign language interpreter within the scope that it does not disrupt the progress of the trial. Also, a sign language interpreter may ask a question to a person related to a case with the permission of the presiding judge, as long as the question is necessary for interpretation.

- A sign language interpreter shall, in principle, be placed in a space between the presiding judge and the person with a speech impairment. Thus, the person with a speech impairment shall be able to see the speaker and the sign language interpreter simultaneously. However, a sign language interpreter may select a different position suitable for interpretation and the presiding judge shall help the sign language interpreter interpret at a position that he/she selects, as long as the progress of the trial is not disrupted.
- A chair that can turn around or a space in which a sign language interpreter may stand and interpret shall be provided so that he/she may, without difficulty, turn his/her body and see in all directions.
- Attention shall be paid so that the contents of written interpretation shall be able to be delivered accurately by adjusting the position of screen and space and the size of letters, etc.

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### **Stenography, Sound Recording, and Video Recording of Pleadings**

- Video recording of examination or pleading shall be positively considered to guarantee the accuracy of sign language interpretation and written interpretation. In addition, it would be advisable to keep the details of written interpretation in accordance with stenographic records.
- In criminal cases, when the prosecutor, the defendant or an attorney makes a motion for stenography, voice recording or video recording (including voice recorded; the same shall apply hereinafter) before the trial date or trial preparation date, all or part of the hearing in the court shall be recorded in stenography or voice or video recorded with voice recording devices or video recording devices. When recognized as necessary, the court may order the same ex officio (Article 56-2 of the Criminal Procedure Act, Article 30-2 of the Regulation on Criminal Procedure). Once a motion stated above is made, it shall be granted unless there are special circumstances.
- Where a litigant makes a motion for stenography, voice recording or video recording of pleadings in a civil case, the motion shall be granted unless there are special circumstances (for example, refer to Article 159 (1) of the Civil Procedure Act, Article 37 (1) of the Regulation on Civil Procedure). Article 159 (1) of the Civil Procedure Act does not stipulate video recording. However, it would be reasonable to deem that video recording is equivalent to stenography or voice recording, in light of Article 37 (1), etc. of the Regulation on Civil Procedure.
- When the court orders to video record the hearing or pleading, it shall be recorded so that

the person with a speech impairment and the sign language of a sign language interpreter stand out well. If necessary, 2 or more video recording devices may be used.

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## **Witness Examination**

### **1. Presiding Judge**

- Matters for which a witness will be examined shall be sent to a sign language interpreter before examining the witness.
- Where the cross-examination of a witness or the party with a speech impairment is scheduled, two sign language interpreters are designated. It is advisable to have the party or its attorney who asks a question and its sign language interpreter in the view of the witness or the party with speech impairment.
- It is advisable that one sign language interpreter does not continue to interpret sign language for more than 30 minutes in order to maintain the quality of sign language interpretation. Where it is anticipated that sign language interpretation will continue to be needed beyond 30 minutes due to witness examination, etc., a resting time of 10 minutes shall be provided for each 30 minutes of sign language interpretation, or an additional sign language interpreter shall be designated so that they could interpret in turns.

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## **Sentence Date**

### **1. Presiding Judge**

- After reading the sentence, the presiding judge shall sufficiently explain its legal meaning so that the sign language interpreter and the person with speech impairment can understand it.

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## **Guidelines on Judicial Assistance for People With Disabilities**

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